

***THE QUARTERLY REVIEW* ARTICLES**

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TERRY STOP UPDATE

The Law, Field Examples and Analysis

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In the next two editions of the “Quarterly Review,” a comprehensive look at the law of “stop and frisk” will be presented. This edition will focus exclusively on various aspects of a *Terry* stop. The next edition will continue with an analysis of various aspects of a *Terry* frisk.

INTRODUCTION

The *Terry Stop* (also known as an “Investigative Detention” or “Stop and Frisk”) is the authority to conduct an investigative detention and frisk of a criminal suspect. It is arguably the most significant piece of case law evolution supporting officer safety and proactive patrol and investigation in the twentieth century. When properly applied, it permits law enforcement officers and agents to interdict a crime before it occurs and allows them to protect themselves from a potentially deadly assault in the process. While this body of law traces its roots to the 1968 Supreme Court case of *Terry v. Ohio*,¹ there have been several noteworthy developments in this body of law over the last forty years, several in the year 2000 alone. This article is intended to serve as a brief overview of the current state of the law for easy reference by Federal law enforcement officers - uniformed police or special agent.

THE PURPOSE OF A *TERRY* STOP

The purpose of a *Terry* stop is to conduct a brief investigation to confirm or deny that the suspect is involved in criminal activity.² A law enforcement officer may initiate a *Terry* stop when he or she suspects that an individual is committing, has committed, or is about to commit a crime, but probable cause does not yet exist to arrest and the officer wants to “stop” the suspect and investigate. If, during the stop, probable cause to arrest is developed, the suspect will be arrested. If probable cause is not developed, the suspect is released. Lawful *Terry* stops can also be used to develop important criminal intelligence. If officers are documenting their *Terry* stops, a file of persons stopped, their descriptions, names, addresses, locations they frequent, etc., can be compiled. For many years, the New York City Police Department would refer to precinct-level “Stop and Frisk Cards” completed by an officer during *Terry* stops when they were looking for leads on unsolved, major crimes in the area. Often, a victim’s general description of an assailant would match that of a suspect stopped three or four times in the recent past in the same general area by precinct cops for suspicion of “pre-robbery” activities. In many cases, these documented *Terry* stops led to photo lineups, fingerprint runs, voluntary contacts, submission to police questioning, etc., that eventually solved the “open” crimes.”

¹ *Terry v. Ohio*, 392 U.S. 1 (1968)

² *Id.*

THE “ROLLING” *TERRY* STOP

Law enforcement officers should remember that, just as a person may be subjected to a lawful *Terry* stop while walking down the street, so too can a moving auto be pulled over (forcibly - via use of emergency lights and siren) if valid *reasonable suspicion* exists to support the stop.³ Both uniformed and plain-clothes personnel can employ this concept.

Field Example: A patrol officer on Highway #37 within the city limits of Noblesville, Indiana hears a police radio dispatch broadcast a “be-on-the-lookout (BOLO)” for an “armed robbery / shots fired” - that just fled a shopping mall six miles away. The suspect and vehicle are described as follows:

Perpetrator: White male, approximately 30 years of age, with blond hair

Armed: Displayed a large silver revolver – shots fired

Vehicle: Fleeing the scene in a white, medium-sized, four-door sedan with Indiana passenger plates starting with the numbers “29”

Direction: Vehicle was last seen traveling north on Highway 37 past Fishers, Indiana heading towards Noblesville, Indiana

Time: Two - four minutes in the past

Victim: One victim shot and likely to die

Witnesses: Several witnesses on the scene.

About two minutes after hearing the radio broadcast, the patrol officer spots a 1994, white, Chrysler Concord four-door sedan driven by what appears to be a white male, approximately 25 – 35 years old. The vehicle is driving Northbound on Highway #37, through the city of Noblesville going the speed limit and committing no moving violations. As the officer pulls up behind the car, he notices it bears Indiana passenger plates “29 N 1109.” The officer calls for backup units and initiates a high-risk felony “Rolling *Terry* Stop” on the suspect vehicle. The driver stops without incident and the officer cautiously approaches. The officer directs the driver out of the vehicle and immediately performs a frisk. A stainless steel .357 caliber, four-inch revolver with full “lug” barrel is found in the driver’s waistband. The suspect is secured and asked if he has a permit for the concealed weapon (required in Indiana). In response, the suspect says, “Yes, but it’s at home.” A check of the State Police handgun permit data-base reveals no such permit. The suspect is arrested and later identified as the gunman.

Variation A: After the stop, the driver fully cooperates, no gun is found during the frisk, but, while the officers are checking the driver’s license and registration,

³ *US v. Cortez*, 449 U.S. 411 (1981)

a witness is driven approximately 8 miles to where the car has been stopped and identifies the driver as the gunman. The suspect is then arrested.

Analysis: In this case, the officers did not have probable cause to arrest the suspect when the vehicle was spotted and could not even be certain the driver was involved due to the general nature of the description. While probable cause to arrest did not exist, “reasonable suspicion” (see the following sections for a detailed definition) that the driver may have been involved in the recent armed robbery, due to the time, location, direction of travel, proximity to crime and matching of the general description. Once lawful “reasonable suspicion” is established, the *Terry* stop may be executed on a moving vehicle, as well as on a pedestrian.

THE “STOP”

1. **Defined.** A *Terry* stop is defined as “a brief, temporary involuntary detention of a person suspected of being involved in criminal activity for the purpose of investigating the potential criminal violation.”⁴ In order to lawfully conduct a *Terry* stop, a law enforcement officer must have “reasonable suspicion,” which has been defined as “articulable”⁵ facts that would lead a reasonable officer to conclude that criminal activity is afoot. More than an unsupported hunch but less than probable cause and even less than a preponderance of the evidence.”⁶

2. **Levels of Suspicion.** To help understand just what “reasonable suspicion” is, it may be helpful to review other standards of proof that most impact a law enforcement officer.

- a. **Mere Suspicion:** A “gut” hunch that criminal activity is afoot. There are no “facts” a law enforcement officer can use to explain or justify his or her “feeling.” This standard will legally justify a voluntary stop only.⁷
- b. **Reasonable Suspicion:** See Section 1, above.
- c. **Probable Cause:** Probable cause means reasonable grounds to believe that a crime has been committed and that a particular suspect has committed it. This level of suspicion will justify an arrest (either a field arrest of an arrest via a warrant).

⁴⁴ *Terry*, 392 U.S. at 30 (“...an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot ...a police officer may in appropriate circumstances and in an appropriate manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest.”)

⁵ *Articulable* means able to explain in words.

⁶ *U.S. v. Sokolow*, 490 U.S. 1 (1989)

⁷ Also known as the *Common Law Right of Inquiry*. Permits an officer or agent to engage any citizen in a purely voluntary conversation (i.e. “May I speak with you a moment? Do you need any help? How long have you been here?”). In these cases, a citizen must be free to terminate the conversation at any time and go his or her way with no restrictions.

- d. **Proof Beyond a Reasonable Doubt:** This is the level of suspicion required for a criminal conviction. This phrase is described differently by different courts. One common reference regarding proof beyond a reasonable doubt is “to a moral certainty.”

3. Factors Supporting Reasonable Suspicion to Conduct a *Terry* Stop. In order to support a *Terry* stop based upon reasonable suspicion, courts have looked at a number of different factors. Some of those factors are listed below. Often, more than one factor must be present to justify a stop, but this is not always the case.

- a. **Hour of the Day:** Actions that are unusual for the hour of the day may indicate possible criminal activity, and can be used to support a *Terry* stop.

Field Example: Law enforcement officers observe a van loading and unloading furniture and equipment out of a restaurant at 3:30 a.m., a time when the restaurant is normally closed. Possible Crime - Burglary.

- b. **Unusual Presence:** Presence in a location that is unusual for the time of day may indicate possible criminal activity.

Field Example: A person that a patrol officer does not recognize is seen in a government employee parking lot at 4:30 a.m., when the building is closed to the public and no night shifts are on-duty (other than police and maintenance). Possible Crime - Theft From An Auto.

- c. **High Crime Area:** If an area has a documented history of being located in a “high crime area,” what might otherwise be considered “innocent conduct” may form the basis for reasonable suspicion to stop and investigate.

Field Example: In an area known for illegal drugs sales (over 60 illegal drug sale arrests over the last three months), a law enforcement officer observes a person standing on a corner approach three different cars that drive up, stop, and exchange what appears to be currency for small plastic bags within a fifteen minute period. Possible Crime - Illegal Sale of Drugs.

- d. **Unusual Dress:** Dress or apparel that is unusual for the area or weather can be indicative of possible criminal activity.

Field Example: It’s August, the temperature is 96 degrees Fahrenheit, with a humidity factor of over 90 percent. A uniformed Federal police officer observes a person walk in to a Federal building wearing the following: A full-length, thick, down parka and a military “web gear” type belt, with a canteen / canteen cover, first aid pouch, what appear to be ammunition magazine carriers and a bayonet sheath without the bayonet in

place, plus a World War II era German Army helmet on his head.
Possible Crime - Possession of a Weapon.

- e. **Unusual Actions:** Actions that are unusual and suspicious may indicate possible criminal activity and can be used as a factor to justify a *Terry* stop.

Field Example: A person walks into a Federal Building and begins to scream at everyone who walks by, “Leave me alone! Don’t take me away! Don’t shoot me!” Possible Crime - Disorderly Conduct.

- f. **Smell:** When a law enforcement officer detects odors that may indicate criminal activity, a *Terry* stop may be justified.

Field Example: An officer talking to a motorist who requested directions smells what he or she thinks is marijuana emanating from the inside of the vehicle. Possible Crime - Possession of Marijuana.

- g. **Sounds:** Sounds that are unusual and indicate possible criminal activity.

Field Example: While walking past a full-sized van parked next to a large Federal building, a uniformed officer hears what she thinks is the sound of a semi-automatic rifle being charged (the slide being pulled back and released to load the weapon and prepare to fire). Possible Crime - Assault on Federal Employee / Possession of an Illegal Weapon

- h. **Information from Witnesses:** Credible information from reliable witnesses that a crime may be in progress.

Field Example: A Federal employee the officer / agent knows and a person the officer / agent does not know stop the law enforcement officer in a Federal building and point out a person waiting for the elevator and explain he just displayed a silver handgun and shouted: “Now I’ll show them.”

Possible Crime – Illegal Possession of a Weapon / Assault on Federal Employee

- i. **Personal Knowledge of a Suspect:** Information an officer / agent has acquired from personal contact in the past with a suspect indicating criminal activity may support a “stop.”

Field Example: An officer / agent has arrested a suspect three times in the past two years for disorderly conduct in a Federal building. Each time, the suspect has been armed with a twelve-inch bayonet in violation of

Federal law. The officer / agent sees the person walk toward the officer / agent in a peaceful manner while both are inside a federal building.

Possible Crime – Illegal Possession of a Weapon

- j. **Statements by a Suspect:** Things that a suspect says may support a stop if it indicates criminal activity.

Field Example: During a car stop (or voluntary contact) with a citizen, within the jurisdiction of Washington D.C. (where it is rare for a citizen to have a valid concealed handgun permit), the citizen says to the officer / agent : “*Hey, I bet my 9 millimeter is bigger than yours!*”

Possible Crime – Illegal Possession of a Weapon / Assault on a Federal Employee

4. **Duration of the Stop:** A suspect may be detained in connection with a *Terry* stop for as long a period as is “reasonable” to conduct a diligent field investigation. If a suspect is detained too long without obtaining probable cause to arrest, a possible civil judgement for unlawful detention is possible. This issue will be decided on a case-by-case review. A common “field rule” used by many law enforcement agencies across the nation is the “20 minute rule.”⁸ However, officers must understand that, depending on the facts and circumstances of each case, twenty minutes may be found to be excessive, while twelve hours may be deemed reasonable.⁹ One factor impacting on the lawful duration of a *Terry* stop is any delay caused by the actions of the suspect, such as lying to an officer who is attempting to corroborate a suspicious story (e.g., when a suspect claims to have borrowed the car from a relative, but cannot provide a complete name or address of the relative). However, delays caused solely by police conduct (such as waiting 90 minutes for a drug detection dog to arrive from across town for a “walk by”) are usually held against the police and will not justify delaying a suspect on a *Terry* stop¹⁰.

⁸ Many police agencies have adopted an informal “20 minute rule” on *Terry* stops. Under the 20-minute rule, if after conducting a *Terry* stop, probable cause to arrest is not developed within twenty minutes, the suspect is released.

⁹ *United States v. Hernandez*, 473 U.S. 531 (1985)(the Supreme Court held that reasonable suspicion existed that the suspect had ingested drugs and that detaining the suspect 12 hours until the suspected drugs were “passed” was reasonable under the circumstances, since the suspect refused to cooperated in any way.)

¹⁰ *United States v. Place*, 462 U.S. 696 (1983)

TERRY FRISK UPDATE

The Law, Field Examples and Analysis

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THE “FRISK”

Defined: A limited search for weapons, generally of the outer clothing, but also of those areas which may be within the suspect’s control and pose a danger to the officer / agent.¹ Many law enforcement agencies teach officers to frisk via a “pat down” of the suspect’s outer clothing.

Legal Basis / Justification for a Frisk: Reasonable Suspicion that the suspect is armed and dangerous (see the previous article for a discussion of what constitutes “reasonable suspicion”).²

Frisk Indicators: See the previous article for a discussion of *Reasonable Suspicion Indicators* as they are virtually the same. The key is that the reasonable suspicion support a belief that the suspect is “armed and dangerous.”

“Stopping” and “Frisking” a Person are two Different Things: An officer / agent cannot automatically frisk everyone lawfully “stopped” under *Terry*. In addition to reasonable suspicion that criminal activity is afoot, the officer / agent must also be able to articulate reasonable suspicion that the suspect is armed and dangerous. “Officer Safety” alone will not justify a frisk. The officer / agent must articulate “why” officer safety was an issue (exactly what risk / danger to the officer / agent or others existed). The officer must “explain” why there was a risk to the officer / agent or others. If the explanation is found to be reasonable, the frisk is good.

All Armed Persons Are Not “Dangerous”: Not every armed person is automatically a risk to the officer / agent or others. For example, Wildlife Conservation Officers checking “take for the day” in an authorized hunting area are not likely to frisk every hunter they contact because they are all armed with large caliber rifles. Additionally, many citizens are often “armed” with conventional and unconventional weapons such as pocketknives, pens, flashlights, etc. A suspect “stopped” for suspicion of check fraud, will generally not be frisked simply because he or she has a pen in their pocket.³

What Can be Removed / Inspected? Items the officer / agent recognizes as a weapon (conventional or unconventional) or that could reasonably contain a weapon. The officer / agent must articulate the pertinent facts and the experience, training and knowledge that

¹ *Terry v. Ohio*, 392 US 1 (1968), *Ybarra v. Illinois*, 444 US 85 (1979).

² *Id.*

³ Note however, since a pen can be used as a weapon, it can support frisk if the person is otherwise acting in a manner that an officer / agent can articulate posed a threat to their safety or others (i.e. threatened to “poke out their eyes with a stick.”)

establish the reasonableness of the conclusion that the item is a weapon or could contain one.

Field Example: An officer / agent has valid reasonable suspicion to conduct a stop and frisk. The officer pats the suspect down and feels a small box like item in a pocket. The officer / agent seizes the box which turns out to be a cardboard flip-top box of cigarettes. The officer / agent opens the box up to see if a small knife or derringer handgun is concealed inside. Upon inspection, the officer / agent sees what is recognized, based on knowledge, training and experience, to be crack cocaine.

Analysis: If the officer / agent can articulate, based on knowledge, training and experience, that knives and small single and five shot derringers exist that can fit inside a flip-top cigarette box - the seizure will likely be a good one.

Plain View Doctrine: Under the plain view doctrine, if an officer / agent is lawfully present and sees what is immediately apparent as contraband or evidence of a crime, the item may be seized and admitted into evidence against a defendant.⁴ If, during a valid stop and frisk, an officer / agent seizes an item that reasonable feels like a weapon (or could contain one) that instead turns out to be contraband or evidence of a crime, that item is admissible.

Field Example: During a valid stop and frisk an officer / agent discovers a belt attached, closed, leather knife sheath. The officer / agent opens the sheath up to see if a knife is inside and, instead, sees what appears to be a small bag of marijuana – this is likely a lawful seizure based upon the plain view doctrine.

Note: It is important to remember that the purpose of a frisk is to find and seize “weapons” NOT evidence of a crime (contraband).⁵ If, while lawfully frisking for a weapon, an officer / agent discovers contraband – it may be seized and used against the defendant. If asked by Defense Counsel, “*When you frisk, one of the reasons you frisk is to detect contraband, right?*” the answer should be “No. I frisk only to detect weapons. But, if while doing that I lawfully discover contraband, then I will seize it!”

“Plain Feel” Doctrine: If while conducting a valid stop and frisk for a weapon, an officer / agent feels what is “immediately recognized” as contraband, the contraband may be lawfully seized. The incriminating nature of the contraband must be “immediately apparent.” If an officer / agent must “manipulate” the item to figure out it is contraband – it is not lawfully seized.

⁴ *Horton v. California*, 496 US 128 (1990)

⁵ *Adams, Warden v. Williams*, 407 US 143 (1972)

Field Examples:

Good Seizure: During a valid stop and frisk, the officer / agent feels in the front pants pocket of the suspect what the officer / agent immediately recognizes as a small quantity of bagged marijuana. The officer / agent seizes the item by pulling it out of the suspect's pocket and upon inspection and field testing, determines the item is a small bag of marijuana unlawfully possessed.

Analysis: This is a good seizure since the officer immediately recognized the item upon first touch as contraband.

Bad Seizure: Same as above except upon performing the frisk, the officer / agent feels in the suspect's front pants pocket and "thinks", but is not sure, the item is bagged marijuana. The officer / agent squeezes and manipulates the item through the pockets with his fingers until convinced it "feels" like bagged marijuana, and then seizes the item which turns out to be bagged marijuana unlawfully possessed.

Analysis: This is a bad seizure since the officer / agent did not "immediately" recognize the item as contraband upon touch.

Frisking the "Lunging Area": An officer / agent, with lawful authority to conduct a stop and frisk, may frisk not only the person of the suspect for weapons, but also any "lunging area" from which the suspect could obtain a weapon. This will include such nearby areas as a newspaper on the ground, a trash barrel, a jacket in the back seat of a car, under the car seats (if the suspect was originally sitting in the car).⁶

Frisking Containers: An officer / agent who finds a closed container within lunging distance of a suspect who is being lawfully stopped and frisked, may open the container to see if it contains a weapon if: a) in light of the officer's experience and training the item could contain a weapon, and b) the container is NOT locked.⁷

Field Example and Analysis: During a lawful "moving" terry stop an officer / agent directs the driver out of the vehicle and conducts a lawful frisk. In this case, the officer / agent may "frisk" under the front driver's seat, a jacket in the back passenger compartment and inside the unlocked center console for weapons since all of these areas are within the lunging distance of the suspect (when he was in the car) and the "containers" were not locked.

Use of Force Issues: Since a *Terry* stop is an "involuntary" detention, reasonable force may be used to execute the stop and, if justified, the frisk.⁸ This usually amounts to

⁶ *Michigan v. Long*, 463 US 1032 (1983)

⁷ *Id.*

⁸ *Graham v. Conner*, 490 US 386 (1989) at Headnote 9: *The right of law enforcement officers to make an arrest or investigatory stop of an individual, as a "reasonable" seizure under the Federal Constitution's Fourth Amendment, necessarily carries with it the right to use some degree of physical coercion or threat*

forcibly stopping a fleeing suspect and using reasonable force to overcome resistance to a lawful frisk. The force used must be reasonable under the circumstances. The US Supreme Court has used language such as “*some degree of physical coercion*” in describing permissible use of force to execute a *Terry* stop.⁹ This article is not intended to review “use of force issues” in detail. Refer to your agency guidelines on the use of force as they will be applicable in executing *Terry* stops. Keep in mind that pointing a service pistol at a suspect can be considered the use of force and that this has been found by the U.S. Supreme Court as being justified in the execution of a *Terry* stop of a suspected violent felon.¹⁰

Additional Points:

Ordering Driver Out of a Vehicle: A driver may be directed out of a car lawfully stopped by the police for a moving violation or on a “Moving *Terry* Stop” with no additional justification.¹¹ The U.S. Supreme Court made this decision primarily based on “officer safety.” This is a tactical decision for the officer / agent. Some officers like the idea of ordering a driver out of a car for

officer safety and control of the suspect. It may also be easier to see items in plain view, handguns concealed on the driver’s person, and to watch for contraband falling onto the roadway as the driver steps out.

Ordering Passenger Out of a Vehicle: In addition to the driver, the passengers of a vehicle lawfully stopped may be directed out of a vehicle by an officer / agent for officer safety.¹² The same points outlined above apply.

Running From Police as Grounds to Stop: Running from the sight of a police officer / agent is a factor that may be considered in determining whether or not *Reasonable Suspicion* to stop exists but may not “by itself” justify a stop and frisk.¹³ There must be some other *Reasonable Suspicion Indicators* to support the stop in addition to running from the police.

Field Example:

Bad Stop: Two uniformed officers are driving down a city street in a jurisdiction with very strict handgun licensing regulations. Concealed handgun permits are rarely granted. The officers see two males, approximate age 20 – 25 years old look in the direction of the marked squad car, turn and run at full speed in the opposite direction. The officers have no other *Reasonable Suspicion*

thereof to effect such arrest or stop.

⁹ Id.

¹⁰ *New York v. Earl*, 431 US 943 (1977)

¹¹ *Pennsylvania v. Mimms*, 434 US 106 (1977)

¹² *Maryland v. Wilson*, 519 US 408 (1997)

¹³ *US v. Wardlow*, 528 US 119 (2000)

Indicators. The officers pick one of the targets, chase him down, tackle him and perform a frisk, finding an unlicensed handgun.

Analysis: This is a bad stop since the only “unusual” thing the officers noticed was running from the police and nothing more.

Good Stop: Same fact pattern as above except that before the suspects run away, the officers see one of them place their hand inside their waist jacket, on the strong side where belt attached holsters are commonly located, and make motions as if they are about to draw a handgun. The two then look in the direction of the squad car, then run in the opposite direction at full speed. The officers chase only the target who appeared to reach into his waistband, tackle him and perform a frisk, finding an unlicensed handgun.

Analysis: This is a good stop as the officers had more than just “running from the police” as a *Reasonable Suspicion Indicator*. In this case the officers saw what indicated to an experienced officer that the target may have been armed with a concealed firearm. That, coupled with running from the police added up to good *Reasonable Suspicion* to perform the stop and frisk.

Anonymous Tips as Grounds to Stop: An anonymous tip alone, even if detailed, cannot form *Reasonable Suspicion* to conduct a stop and frisk. The officer / agent must add personal observations to corroborate and / or add to information received from the anonymous source.¹⁴

Bad Stop: Police dispatch receives an anonymous 911 call that a white male, approximately 40 years old, wearing tan trousers and a blue polo shirt is standing on the corner of 4th Avenue and 71st street and is armed with a silver revolver concealed in an ankle holster. The patrol jurisdiction has strict licensing requirements and rarely issues concealed handgun permits. A two officer patrol unit arrives at 4th Avenue and 71st street within two minutes of the dispatch broadcast. They see a male while fitting that description and immediately perform a stop and frisk, finding an unlawfully concealed handgun.

Analysis: This is a bad stop and frisk as the officers relied solely on the anonymous tip.

Good Stop: Same as above but in this case, once on the scene, the officers spot what appears to be a “bulge” at the left ankle of the target, under his pants cuff. This indicates to an experienced officer that an ankle holster may be present. The officers then immediately perform a stop and frisk and find an unlicensed handgun.

¹⁴ *Florida v. J.L.*, 529 US 266 (2000)

Analysis: This is a good stop since the officers added personal observation that corroborated and added to the information contained in the anonymous tip.

Note: If sufficiently detailed information is received from an identified and reliable person (not an anonymous source), it may form *Reasonable Suspicion*.¹⁵

Evidence Suppression / Court Testimony Tactics: *Reasonable Suspicion* forms the legal basis to conduct a *Terry* stop. If a defense attorney can convince a Judge, in an Evidence Suppression Hearing that an officer / agent lacked sufficient *Reasonable Suspicion* to perform a stop and / or frisk, any evidence found as a result of the stop / frisk will be suppressed. Since it is often the weapons or contraband found on a frisk that form the basis of an arrest, losing the evidence will obviously create a significant risk of having the entire case dismissed for lack of evidence.

Articulate!: The definition most often used for *Reasonable Suspicion* includes the phrase “*Articulable facts....*” An officer / agent must be able to “articulate” factors that lead the officer / agent to conclude that *Reasonable Suspicion* existed to support the stop and / or frisk. The officer / agent must, through use of words, make the Judge “see, hear, smell and feel” what the officer / agent did. The officer / agent must paint a verbal picture that makes the Judge “see” the situation through the eyes of an experienced police officer. To an average citizen, a bulge at the lower left ankle, under a pants cuff, may mean nothing. To an experienced police officer it indicates an ankle holster, perhaps because he or she has worn an ankle holster in the past and knows from personal experience the “print” it demonstrates. Or, perhaps the officer / agent has seen other officers, both on and off duty, use them and knows how they appear.

Quantify Your “Experience”: If relying on the “plain feel” doctrine, where the officer / agent performed a stop and frisk for a weapon but discovered powdered cocaine in a pocket, the officer / agent must be able to justify how they are qualified to “immediately” recognize powdered cocaine through at suspect’s pants. You can be sure the defense attorney will make this an issue. The court must be convinced that the officer / agent has the training and or experience to back up the “immediate recognition.” Here is an example of what has worked in the past¹⁶:

“I have personally frisked at least one hundred (100) suspects, both during Terry Stops and searches incident to arrest and discovered powdered cocaine in small plastic bags in trousers pockets. In addition, during in-service field training for our officers in “drug recognition, I routinely “frisk” other officers who have placed cocaine in their trouser pockets. I have done this at least once a month in the past year. I have also handled

¹⁵ *Adams, Warden v. Williams*, 407 US 143 (1972)

¹⁶ Author’s personal experience in New York and Indiana criminal courts

at least 25 bags of cocaine in its powdery form seized from automobiles, and this has added to my familiarity with how it feels to the touch I have received formal training on how powdery cocaine feels to the touch at my police academy and while on active duty in the Air Force, using actual powdered cocaine.”

Note: Obviously, an officer / agent must testify truthfully about their experience and training in detecting contraband by feel. The above is intended to serve only as a guide on what has worked in the past.

Officer Safety Alone Will Not Justify a Frisk: Assuming that a Judge finds proper *Reasonable Suspicion* to support a *Terry* stop, a weapon seized can still be suppressed (lost) if a defense attorney can convince a Judge that there was no *Reasonable Suspicion* that the suspect was “*armed and dangerous*.” Therefore, when an officer / agent answers the question *Why did you conduct the frisk?* by simply saying “*Officer safety*” and nothing more – there is a great likelihood that the evidence will be lost.

Field Example:

Question: *Why did you frisk the suspect?*

Bad Answer: *Officer safety*

Good Answer: *I was in fear for my safety because I was patrolling in a one-officer patrol unit, it was 4:30 a.m., the driver had no driver’s license or vehicle registration, the car’s rear window was broken and I feared the car may have been recently stolen. I know that car thieves use burglar’s tools to steal cars and these tools can be used as a weapon against me. Auto theft is a felony offense and in my experience, the stop and / or arrest of a felon by a one officer patrol unit often results in an assault against the officer. I was concerned with officer safety.*

Important Note: All Federal Law Enforcement Officers must check their agency regulations on policy and guidance regarding application of the *Terry* stop legal concepts. This article reviews U.S. Supreme Court rulings on the subject, not individual officer / agent / agency arrest or investigative authority or policy. Most Federal Law Enforcement Officers while on-duty and conducting official duties will have “police” authority as outlined in the preceding reviews. Some Federal Law Enforcement Officers have been granted “peace officer” type status (on and / or off-duty) by state, county or local police authority / statute. It is the individual responsibility of the officer / agent to coordinate with his or her agency to determine if and when he or she has “police” authority regarding *Terry* stop legal and operational concept.

FRISKING THE COMPANION OF AN ARRESTEE: THE “AUTOMATIC COMPANION” RULE

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The Fourth Amendment to the United States Constitution prohibits “unreasonable” searches and seizures. What constitutes an “unreasonable” search or seizure has been a source of great controversy. “Much of the modern debate over the meaning of the Fourth Amendment has focused on the relationship between the reasonableness requirement and the warrant requirement.”¹ Specifically, “the central question has been whether and under what circumstances are the police entitled to conduct ‘reasonable’ searches without first securing a warrant?”² For instance, when law enforcement officers arrest X, what actions may the officers take with regards to Y, a companion of X who was present with X at the time of the arrest? May they automatically conduct a “frisk” of Y for weapons? Or must they first have reasonable suspicion to believe that Y is presently armed and dangerous before they may conduct a “frisk?” Some, but not all, federal courts have adopted the “automatic companion” rule, which grants a law enforcement officer the authority to lawfully conduct a “frisk” for weapons on any person who is accompanying an arrestee at the time of the arrest.³ The purpose of this article is to present both sides of the “automatic companion” debate so that law enforcement officers have an understanding of why the rule has been adopted, or rejected, by various federal courts. Any discussion of the “automatic companion” rule must necessarily begin with a review of the Supreme Court’s decision in *Terry v. Ohio*.⁴

I. *TERRY V. OHIO*

In *Terry*, the Supreme Court carved out an exception to the Fourth Amendment’s probable cause and warrant requirements to conduct a search. Instead, the Court held, a law enforcement officer could perform a “stop and frisk” of a suspect if the officer had reasonable suspicion that (1) criminal activity was afoot and (2) the suspect might be armed and presently dangerous. The facts of *Terry* are well-known to virtually every law enforcement officer. Nonetheless, aspects of the Supreme Court’s opinion bear repeating here, as they are key to understanding the “automatic companion” debate. Beginning its analysis, the Court noted that “[s]treet encounters between citizens and police officers are incredibly rich in diversity.”⁵ Because of this diversity, police conduct during these encounters requires “necessarily swift action, predicated upon the on-the-spot observations of the officer on the beat-[conduct] which historically has not been, and as a practical matter could not be, subjected to the warrant

¹ *Ybarra v. Illinois*, 444 U.S. 85, 100 (1979)(Rehnquist, J., dissenting)

² *Id.*

³ Whether the arrest is conducted with or without a warrant does not appear to be controlling when determining the applicability of the “automatic companion” rule. Additionally, “though a majority of the cases have involved a full-fledged arrest of the other person, essentially the same analysis is appropriate as to the companion of a person stopped for investigation or subjected to a non-custodial arrest.” 4 Wayne R. LaFare, *Search and Seizure* §9.4(a) at 261 n. 85 (3rd ed. 1996)

⁴ 392 U.S. 1 (1968)

⁵ *Id.* at 13

procedure.”⁶ Instead, the standard in evaluating police conduct in these situations is the Fourth Amendment’s general “reasonableness” requirement. In determining whether the police conduct was “reasonable,” a court must balance the individual’s right to be free from arbitrary governmental interference with both the necessity of detecting and preventing crime, as well as “the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.”⁷ The Supreme Court realized that the public’s interest in protecting police officers from hidden dangers was compelling.

American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives. In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.⁸

The officer need not be absolutely certain that the suspect is armed. Instead, “the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.”⁹ In determining whether a law enforcement officer acted reasonably, “due weight must be given ... to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.”¹⁰

II. *YBARRA V. ILLINOIS*¹¹

The Supreme Court has never directly addressed the constitutionality of the “automatic companion” rule.¹² Regardless, some peripheral guidance on the issue may be found in the Supreme Court’s decision in *Ybarra*, a ruling that “arguably invalidated the ‘automatic companion’ rule.”¹³ In *Ybarra*, police officers in Aurora, Illinois, executed a search warrant at a local tavern for evidence of narcotics possession. The warrant authorized the officers to search the tavern and the person of a bartender named “Greg.” Upon serving the warrant, the officers found a number of individuals present in the tavern (approximately 9-13). Everyone present was subjected to a *Terry* frisk for weapons, including an individual named Ventura Ybarra. This

⁶ *Id.* at 20

⁷ *Id.* at 23

⁸ *Id.* at 23-24

⁹ *Id.* at 27 (emphasis added)

¹⁰ *Id.* (citation omitted)

¹¹ *Supra*, note 1

¹² *United States v. Flett*, 806 F.2d 823, 826 (8th Cir. 1986)

¹³ Case Comment, *Criminal Law - United States v. Bell: Rejecting Guilt by Association in Search and Seizure Cases*, 61 NOTRE DAME L. REV. 258, 263 (1986)

frisk was based upon an Illinois statute that authorized a search of any person found in the place at the time a search warrant was being executed. *Ybarra* was frisked twice by police officers, who ultimately found heroin on his person. The Supreme Court held that the search of *Ybarra* violated both the Fourth and Fourteenth Amendments. Specifically, the Court noted that “[t]he initial frisk of *Ybarra* was simply not supported by a reasonable belief that he was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a pat-down of a person for weapons.”¹⁴ Further, the Court reasoned that

[n]othing in *Terry* can be understood to allow a generalized “cursory search for weapons” or, indeed, any search whatever for anything but weapons. The “narrow scope” of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on the premises where an authorized narcotics search is taking place.¹⁵

On its face, *Ybarra* would seem to resolve the “automatic companion” debate by requiring in each instance that a law enforcement officer possess reasonable suspicion that the person to be frisked is armed and presently dangerous. However, this is not necessarily the case.

III. THE “AUTOMATIC COMPANION” RULE

As noted, the Supreme Court has never directly addressed the applicability of the *Terry* exception to the search of a companion of an arrestee. While some guidance on this issue may be found in select Supreme Court decisions, such as *Terry* and *Ybarra*, a lack of clear direction has resulted in a split among the United States Circuit Courts of Appeal over the constitutionality of the “automatic companion” rule.

A. Circuits Adopting the “Automatic Companion” Rule

Currently, three circuits (the Fourth, Seventh, and Ninth) have adopted a bright-line rule allowing law enforcement officers to “frisk” the companion of an arrestee.¹⁶ These circuits have relied primarily upon a law enforcement officer’s need to protect himself, as well as innocent bystanders, from the potential dangers that arise during the arrest of a suspect.¹⁷ In *United States v. Berryhill*,¹⁸ the Ninth Circuit, relying on the decision in *Terry*, became the first court to recognize the “automatic companion” rule.

¹⁴ *Ybarra*, 444 U.S. at 92

¹⁵ *Id.* at 94

¹⁶ In addition, it appears that the 2nd and 5th Circuits, while not explicitly adopting the “automatic companion” rule have, nonetheless, implicitly adopted its principles. See *United States v. Vigo*, 487 F.2d 295 (2nd Cir. 1973); *United States v. Barlin*, 686 F.2d 81 (2nd Cir. 1982); *United States v. Tharpe*, 536 F.2d 1098 (5th Cir. 1976), *overruled on other grounds by United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987); and *United States v. Sink*, 586 F.2d 1041 (5th Cir. 1978). Further, various states have adopted the “automatic companion” rule.

¹⁷ *Terry*, 392 U.S. at 24 n.21 (“The easy availability of firearms to potential criminals in this country is well known ... [and] is relevant to an assessment of the need for some form of self-protective search power”).

¹⁸ 445 F.2d 1189 (9th Cir. 1971)

We think that *Terry* recognizes and common sense dictates that the legality of such a limited intrusion into a citizen's personal privacy extends to a criminal's companion at the time of arrest. It is inconceivable that a peace officer effecting a lawful arrest of an occupant of a vehicle must expose himself to a shot in the back from a defendant's associate because he cannot, on the spot, make the nice distinction between whether the other is a companion in crime or a social acquaintance. All companions of an arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory "pat-down" reasonably necessary to give assurance that they are unarmed.¹⁹

In *United States v. Poms*,²⁰ the Fourth Circuit endorsed the decision in *Berryhill*, remarking that they saw "... no reason why officers may not ... engage in a limited search for weapons of a known companion of an arrestee, especially one reported to be armed at all times, who walks in on the original arrest by sheer happenstance."²¹ A similar result was reached by the Seventh Circuit in *United States v. Simmons*.²²

While *Berryhill*, *Poms*, and *Simmons* were all decided in the years prior to *Ybarra*, the circumstances in *Ybarra* are far enough removed from those in which the "automatic companion" rule would apply so as to leave open the question of the rule's constitutionality. It can be argued that the plain language of *Ybarra*

... removes it from the automatic companion controversy. The Court spoke of people who "happen to be on the premises" and "generalized searches," and thus was not concerned with the search of a "companion." A companion is a person who accompanies another; a person who is an associate or comrade. Certainly, patrons in a bar are not necessarily associates or comrades. *Ybarra* dealt with people who were completely independent of the person being searched. This type of search does not fall under the automatic companion rule.²³

B. Circuits Rejecting the Automatic Companion Rule

Two circuits (the Sixth and Eighth) have rejected the "automatic companion" rule, based upon the Supreme Court's rulings in both *Terry* and *Ybarra* regarding individualized "reasonable suspicion." These circuits utilize a "totality of the circumstances" test in determining whether the companion of an arrestee may be subjected to a *Terry* frisk.

These courts acknowledge the safety concerns aired by the Supreme Court in *Terry*. However, they focus more on the Court's call for specific, factual justification of a frisk based on reasonable suspicion, by requiring that a frisk of

¹⁹ *Id.* at 1193

²⁰ 484 F.2d 919 (4th Cir. 1973)(per curiam)

²¹ *Id.* at 922

²² 567 F.2d 314 (7th Cir. 1977)

²³ Note, *The Automatic Companion Rule: A Bright Line Standard for the Terry Frisk of an Arrestee's Companion*, 62 NOTRE DAME L. REV. 751, 756 (1987)

an arrestee's companion be based on specific, articulable facts known to the officer at the time of the search. The circumstances examined by these courts to determine if reasonable suspicion exists include companionship, but are not limited to it.²⁴

In *United States v. Bell*,²⁵ the Sixth Circuit refused the government's invitation to adopt the "automatic companion" rule, noting "serious reservations about the constitutionality of such a result under existing precedent."²⁶ Addressing a very real concern about the scope of the rule, the court did not believe "... that the *Terry* requirement of reasonable suspicion ... [had] been eroded to the point that an individual may be frisked based upon nothing more than an unfortunate choice of associates."²⁷ Further, the court found the rule to be "... inconsistent with the Supreme Court's observation that 'it has been careful to maintain [the] narrow scope' of *Terry*'s exception to the warrant requirement."²⁸ Instead, "the fundamental inquiry in determining whether evidence is admissible is whether, in light of the 'totality of the circumstances' surrounding the seizure, it was reasonable for law enforcement personnel to proceed as they did."²⁹ While the single fact of companionship does not, standing alone, justify a frisk, "... it is not irrelevant to the mix that should be considered in determining whether the agent's actions were justified."³⁰

Similarly, in *United States v. Flett*,³¹ the Eighth Circuit refused to adopt the "automatic companion" rule, citing both *Terry* and *Ybarra* in support of its decision. The Eighth Circuit, recognizing that the Sixth Circuit had "explicitly rejected [the] 'automatic companion' rule in *Bell*,"³² endorsed the *Bell* court's rationale in so doing. Commenting on the "automatic companion" rule, the court asserted that it "... [appeared] to be in direct opposition to the Supreme Court's directions in both *Terry* and *Ybarra* that the officers articulate specific facts justifying the suspicion that an individual is armed and dangerous."³³

However, even some who argue against application of the "automatic companion" rule seem to recognize the limited usefulness of *Ybarra* in considering its application.

While the reasoning of *Ybarra* argues against applying an automatic companion rule, the holding actually referred to quite different circumstances than existed in *Berryhill*, *Poms*, *Simmons*, and *Bell*. The Court in *Ybarra* determined whether law enforcement officials have the right to search an individual solely because the individual is on the premises for which the police have a valid search warrant. Whereas, in *Berryhill*, *Poms*, *Simmons*, and *Bell*, the person searched was

²⁴ Note, *The Automatic Companion Rule: An Appropriate Standard to Justify the Terry Frisk of an Arrestee's Companion?*, 56 FORDHAM L. REV. 917, 924-925 (citations omitted)

²⁵ 762 F.2d 495 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 155 (1985)

²⁶ *Id.* at 498

²⁷ *Id.* at 499 (citation omitted)

²⁸ *Id.* [citing *Dunaway v. New York*, 442 U.S. 200, 210 (1979)]

²⁹ *Id.* [citing *United States v. Cortez*, 449 U.S. 411, 417 (1981)]

³⁰ *Id.* at 500

³¹ *Supra*, note 12

³² *Id.* at 827

³³ *Id.*

associated with the person arrested rather than simply being incidentally on the premises. Thus, *Ybarra*'s impact on the automatic companion rule is minimal.³⁴

IV. CONCLUSION

Currently, three Federal Circuit Courts of Appeal allow law enforcement officers to automatically frisk the companion of an arrestee who is present at the time of the arrest. These circuits believe that the societal interest in protecting law enforcement officers from hidden weapons that could be carried by companions of an arrestee outweighs the minimal intrusion suffered by the individual during a brief pat-down for weapons. Alternatively, two Federal Circuit Courts of Appeal have rejected the “automatic companion” rule, requiring instead that law enforcement officers have reasonable suspicion to believe the companion of the arrestee is armed and presently dangerous. For these two circuits, the issue of companionship is but one factor to consider when looking at the totality of the circumstances surrounding the frisk.

³⁴ *Supra*, note 13 at 263

SEARCHING A VEHICLE WITHOUT A WARRANT

The *Carroll* Doctrine

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The Federal Bureau of Investigations reports that 93 law enforcement officers were killed while engaged in traffic stops or pursuits during the period 1989 – 1998.¹ During 1998 alone, 9 law enforcement officers were killed and another 6,242 were assaulted during traffic stops or pursuits.² Fortunately, the Supreme Court has long recognized the very real dangers faced by law enforcement officers who confront suspects located in vehicles.³ Further, the Court has noted that “for the purposes of the Fourth Amendment, there is a constitutional difference between houses and cars.”⁴ This “constitutional difference” can result in the warrantless search of a vehicle being upheld under circumstances in which the search of a home would not.⁵

A vehicle may be searched without a warrant in a variety of situations. In the next few editions of the *Quarterly Review*, I will discuss five of the most frequently encountered exceptions to the warrant requirement of the Fourth amendment, as those exceptions apply to searches of vehicles. In discussing each exception, the background, requirements, and scope of the search will be addressed. With regard to the scope of the search, the articles will focus on four specific areas: The passenger compartment of the vehicle; the trunk of the vehicle; unlocked containers located in the vehicle; and locked containers located in the vehicle. The first article in this series will deal with searching a vehicle pursuant to consent. Subsequent articles will deal with searching a vehicle incident to arrest; searching a vehicle under the mobile conveyance exception (*Carroll* Doctrine); searching a vehicle as part of the inventory process; and searching a vehicle during a lawful *Terry* stop.

BACKGROUND

“It is well-settled that a valid search of a vehicle moving on a public highway may be had without a warrant, if probable cause for the search exists, i.e., facts sufficient to warrant a man of reasonable caution in the belief that an offense is being committed.”⁶ This exception was first established by the Supreme Court in the 1925 case of *Carroll v.*

¹ Federal Bureau of Investigation, *Uniform Crime Reports*, “Law Enforcement Officers Killed and Assaulted in 1998”, Table 19, Page 32

² *Id.* at Table 20, Page 33 and Table 40, Page 88

³ See *Michigan v. Long*, 463 U.S. 1032, 1048 (1983) (Noting “danger presented to police officers in ‘traffic stops’ and automobile situations”); *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (Decision rested, in part, on the “inordinate risk confronting an officer as he approaches a person seated in an automobile”); and *Adams v. Williams*, 407 U.S. 143, 148 n.3 (1972) (Citing a study indicating that “approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile”)

⁴ *Chambers v. Maroney*, 399 U.S. 42, 52 (1970)

⁵ *Cardwell v. Lewis*, 417 U.S. 583, 589 (1974)

⁶ *Fernandez v. United States*, 321 F.2d 283, 286-287 (9th Cir. 1963) (citations omitted)

United States,⁷ and provides that, if a law enforcement officer has probable cause to believe that a vehicle has evidence of a crime or contraband located in it, a search of the vehicle may be conducted without first obtaining a warrant. There are two (2) separate and distinct rationales underlying this exception. First, the inherent mobility of vehicles typically makes it impracticable to require a warrant to search, in that “the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.”⁸ As the Supreme Court has consistently observed, the inherent mobility of vehicles “creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible.”⁹ For this reason, “searches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the result might be the opposite in a search of a home, a store, or other fixed piece of property.”¹⁰ Second, an individual’s reduced expectation of privacy in a vehicle supports allowing a warrantless search based on probable cause.

“Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspections stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.”¹¹

REQUIREMENTS

There are two (2) requirements for a valid search under the mobile conveyance exception. First, there must be probable cause to believe that evidence of a crime or contraband is located in the vehicle to be searched. “Articulating precisely what ... ‘probable cause’ mean[s] is not possible.”¹² Suffice it to say, probable cause cannot be “readily, or even usefully, reduced to a neat set of legal rules.”¹³ Instead, the Supreme Court has found probable cause to exist “where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.”¹⁴ In essence, this simply means that before conducting a warrantless search of a vehicle, a law enforcement officer should have sufficient facts available to him so that if he attempted to obtain a warrant from a magistrate judge, he would be successful. As noted by the Supreme Court in *United States v. Ross*:¹⁵ “[O]nly the prior approval of the magistrate is waived; the search otherwise [must be such] as the magistrate could authorize.”¹⁶ Thus, a search of a vehicle

⁷ 267 U.S. 132 (1925)

⁸ *Id.* at 153

⁹ *Opperman*, 428 U.S. 364 at 267

¹⁰ *Cooper v. California*, 386 U.S. 58, 59 (1967)(citation omitted)

¹¹ *Opperman*, 428 U.S. at 368

¹² *Ornelas v. United States*, 517 U.S. 690, 695 (1996)

¹³ *Id.* at 695-696

¹⁴ *Id.* at 696

¹⁵ *United States v. Ross*, 456 U.S. 798 (1982)

¹⁶ *Id.* at 823

based upon probable cause “is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant had not actually been obtained.”¹⁷ In determining whether probable cause exists, courts utilize a “totality of the circumstances” test.¹⁸

Establishing probable cause to search a vehicle may be accomplished in a variety of ways. For example, a law enforcement officer may be able to establish probable cause based on a tip provided to him by a reliable confidential informant.¹⁹ Additionally, when a law enforcement officer personally observes evidence or contraband in plain view inside a vehicle, probable cause can arise. Additionally, the “plain smell” corollary to the plain view doctrine may allow a law enforcement officer to establish probable cause based upon his or her sense of smell. In *United States v. Miller*,²⁰ law enforcement officers used both plain view and plain smell observations to justify the warrantless search of the suspect’s vehicle. As stated by the Ninth Circuit:

The police officers who arrived at the Elm Street address detected a strong smell of phylacetic acid, known to be used in the manufacture of methamphetamine, emanating from Miller’s car. In addition, the officers observed a handgun in plain view on the front floor and laboratory equipment commonly used in the manufacture of methamphetamine on the backseat of Miller’s car. These plain view, plain smell observations ... gave the officers sufficient independent probable cause to search Miller’s car without a warrant.²¹

The second requirement for a valid search under the mobile conveyance exception is that the vehicle be “readily mobile.” This does not mean that the vehicle be moving at the time it is encountered, only that the vehicle be capable of ready movement. Illustrative on this point is the Supreme Court’s decision in *California v. Carney*.²² In *Carney*, law enforcement officers searched a motor home after establishing probable cause that marijuana was located inside. At the time of the search, the motor home was parked in a parking lot in downtown San Diego. Upon finding marijuana, the defendant was arrested and later pled *nolo contendere* to the charges against him. On appeal, the California Supreme Court overturned the defendant’s conviction, finding that the mobile conveyance exception did not apply in this case, in that “the expectations of privacy in a motor home are more like those in a dwelling than in an automobile because the primary function of motor homes is not to provide transportation but to ‘provide the occupant with living quarters.’”²³

¹⁷ *Id.* at 809

¹⁸ *Illinois v. Gates*, 462 U.S. 213 230-231 (1983)

¹⁹ *Maryland v. Dyson*, 527 U.S. 465 (1999)

²⁰ 812 F.2d 1206 (9th Cir. 1987)

²¹ *Id.* at 1208-1209. See also *United States v. Harris*, 958 F.2d 1304 (5th Cir.), cert. denied, 506 U.S. 898 (1992)(plain smell) and *United States v. Anderson*, 468 F.2d 1280 (10th Cir. 1972)(plain smell)

²² 471 U.S. 386 (1985)

²³ *Id.* at 389 (citation omitted)

The Supreme Court, however, disagreed, finding the mobile conveyance exception applicable in this case. After reviewing the bases for the exception, the Court concluded:

When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes – temporary or otherwise – the two justifications for the vehicle exception come into play. First, the vehicle is obviously readily mobile by the turn of an ignition key, if not actually moving. Second, there is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling. At least in these circumstances, the overriding societal interests in effective law enforcement justify an immediate search before the vehicle and its occupants become unavailable.²⁴

While the Supreme Court did not discuss the applicability of the mobile conveyance exception to a motor home that is “situated in a way or place that objectively indicates that it is being used as a residence,”²⁵ among the factors they deemed relevant included the location of the motor home; whether it was readily mobile or elevated on blocks; whether it was licensed; whether it was connected to utilities; and whether it had convenient access to a public road.

Two additional matters regarding the mobile conveyance exception deserve comment. First, there is no “exigency” required to conduct a warrantless vehicle search; all that is required is a mobile conveyance and probable cause. Thus, even if a law enforcement officer had the opportunity to obtain a warrant and failed to do so, the search will still be valid if the two requirements discussed above were present. In *Maryland v. Dyson*,²⁶ a law enforcement officer received a tip from a reliable confidential informant that the defendant would be returning to Maryland later that day carrying drugs in a specific vehicle with a specific license plate number. This information gave the officer probable cause to search the vehicle. Approximately, 14 hours later, the defendant’s vehicle was stopped as it returned to Maryland. In upholding the search, the Supreme Court cited to their previous decisions in finding that “the automobile exception does not have a separate exigency requirement: ‘If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment ... permits the police to search the vehicle without more.’”²⁷

Second, once a law enforcement officer has probable cause to search a readily mobile vehicle, the search may be conducted immediately or later at the police station. “There is no requirement that the warrantless search of a vehicle occur

²⁴ *Id.* at 392-393 (footnote omitted)

²⁵ *Id.* at 394 n.3

²⁶ 527 U.S. 465

²⁷ *Id.* at 466

contemporaneously with its lawful seizure.”²⁸ In *United States v. Johns*,²⁹ the Supreme Court upheld the warrantless search of three packages that had been seized from a vehicle three days earlier, noting that “the justification to conduct such a warrantless search does not vanish once the car has been immobilized.”³⁰ Nonetheless, law enforcement officers must act “reasonably” and may not “indefinitely retain possession of a vehicle and its contents before they complete a vehicle search.”³¹

SCOPE

The scope of a search conducted pursuant to the mobile conveyance exception was laid out by the Supreme Court in *United States v. Ross*.³² There, the Court stated:

We hold that the scope of the warrantless search authorized by [the mobile conveyance] exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of *every part of the vehicle and its contents that may conceal the object of the search*.³³

It should be remembered, however, that probable cause to search does not automatically entitle a law enforcement officer to search every part of a vehicle. For example, where there is probable cause to believe that a vehicle contains drugs, a search of the glove compartment would be permissible. Alternatively, if there is probable cause that the vehicle contains a large stolen television, a search of the glove compartment would be impermissible, in that the television could not be concealed in that location. Any mobile conveyance search is necessarily limited by what it is the officers are seeking in their search. In sum, if a search warrant could authorize the officers to search in a particular location, such as the passenger compartment or trunk of the vehicle, the officers may search there without a warrant. A law enforcement officer may also search locked or unlocked containers located in the vehicle, if the object of the search could be concealed inside. The rule on containers appears to be relatively straightforward. Nonetheless, the issue of searching containers located in a vehicle merits additional discussion. As one commentator has observed:

The Supreme Court has faced profound difficulties when reviewing warrantless searches of closed containers found in autos. The Court has divided these cases into two groups. In the first group of cases, police possess probable cause to suspect that a closed container in a vehicle contains incriminating evidence, but lack probable cause to suspect that any other part of the auto holds such evidence. In the second group of

²⁸ *United States v. Johns*, 469 U.S. 478, 484 (1985)(citations omitted)

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 487

³² *Supra*, note 10

³³ *Id.* at 825 (emphasis added)

cases, police have probable cause to search the entire auto and unexpectedly stumble upon a closed container.³⁴

In the first group of cases, the Supreme Court's decision in *California v. Acevedo*³⁵ is controlling. In *Acevedo*, the police had probable cause that a container placed in the trunk of a vehicle contained marijuana. Believing they might lose the evidence if they sought a search warrant, the officers stopped the vehicle, opened the trunk, and searched the container (a paper bag). Marijuana was found inside the bag. In finding the search of the paper bag legal, the Supreme Court held that, when law enforcement officers have probable cause that a specific container placed inside a vehicle has evidence of a crime or contraband located inside of it, they may search the container, locked or unlocked, under the mobile conveyance exception. However, the probable cause relating to the container does not support a general search of the vehicle. If the officers wish to search the entire vehicle, they must have some other justification to do so, such as consent or a search incident to arrest. As stated by the Supreme Court:

In the case before us, the police had probable cause to believe that the paper bag in the automobile's trunk contained marijuana. That probable cause now allows a warrantless search of the paper bag. The facts ... reveal that the police did not have probable cause to believe that contraband was hidden in any other part of the automobile and a search of the entire vehicle would have been without probable cause and unreasonable under the Fourth Amendment.³⁶

In the second group of cases, law enforcement officers have probable cause to search the entire vehicle and discover a closed container during their search. When this occurs, the officers may search the container, whether locked or unlocked, if what they are seeking could be concealed inside of it. As noted by the Supreme Court in *Ross*, *supra*:

The scope of a warrantless search of an automobile ... is not defined by the nature of the container in which contraband is secreted. Rather, it is defined by the object of the search and the place in which there is probable cause to believe that it may be found.³⁷

Further, the rule of *Ross* has been extended to include a passenger's belongings. In *Wyoming v. Houghton*,³⁸ the Supreme Court noted that "neither *Ross* nor the historical evidence it relied upon admits of a distinction among packages or containers based on ownership."³⁹ Accordingly,

³⁴ Steinberg, David E., *The Drive Toward Warrantless Auto Searches: Suggestions From a Backseat Driver*, 80 B.U.L.REV. 545, 550 (2000)(footnotes omitted)

³⁵ *California v. Acevedo*, 500 U.S. 565 (1991)

³⁶ *Id.* at 579

³⁷ *Ross*, 456 U.S. at 824

³⁸ 526 U.S. 295 (1999)

³⁹ *Id.* at 302

“police officers with probable cause to search a car may inspect passengers’ belongings found in the car capable of concealing the object of the search.”⁴⁰

⁴⁰ *Id.* at 307

SEARCHING A VEHICLE WITHOUT A WARRANT

Search Incident to Arrest

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In this article of the *Quarterly Review*, I will discuss searching a vehicle without a warrant during a search incident to a valid arrest. Again, in discussing this exception to the Fourth Amendment's warrant requirement, the background, requirements, and scope of the search will be addressed. With regard to the scope of the search, the articles will focus on four specific areas: The passenger compartment of the vehicle; the trunk of the vehicle; unlocked containers located in the vehicle; and locked containers located in the vehicle.

SEARCHES INCIDENT TO ARREST

BACKGROUND

It has long been recognized that a search conducted incident to a lawful custodial arrest "is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."¹ In *United States v. Robinson*,² the Supreme Court noted "two historical rationales for the search incident to arrest exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial."³ The permissible scope of a search incident to arrest was outlined by the Supreme Court in the 1969 case of *Chimel v. California*,⁴ where they held:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidence items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.⁵

¹ *United States v. Robinson*, 414 U.S. 218, 235 (1973)

² *Id.*

³ *Id.*

⁴ 395 U.S. 752 (1969)

⁵ *Id.* at 762-763

Unfortunately, “[w]hile the *Chimel* case established that a search incident to arrest may not stray beyond the area *within the immediate control of the arrestee*,”⁶ defining exactly what was meant by that phrase was problematic, especially when dealing with vehicles. Twelve years after *Chimel* was decided, the Supreme Court addressed “the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants” in *New York v. Belton*.⁷

REQUIREMENTS

A search incident to arrest may only be conducted when two (2) requirements have been met. First, there must have been a lawful custodial arrest. At a minimum, this requires that (1) probable cause exist to believe that the arrestee has committed a crime and (2) an arrest is actually made. A search incident to arrest may not be conducted in a situation where an actual arrest does not take place.⁸ For example, a search incident to arrest may not be conducted in a *Terry*-type situation, in that “an arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different.”⁹ Illustrative on this point is *Knowles v. Iowa*,¹⁰ where the Supreme Court struck down an Iowa statute that permitted an officer to conduct a “search incident to citation” in those cases where a law enforcement officer had probable cause to arrest a suspect for a traffic violation, but chose, instead, simply to issue a traffic citation. Citing *Robinson, supra*, the Supreme Court noted that the Iowa statute did not implicate the two historical justifications permitting a search incident to arrest. First, a custodial arrest “involves danger to an officer because of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station.”¹¹ The same degree of danger is not present when a law enforcement officer is issuing a traffic citation. Second, the likelihood of evidence being destroyed in the type of situation addressed by the Iowa law was minimal.

The second requirement for a lawful search incident to arrest is that the search must be “substantially contemporaneous” with the arrest.¹² Unfortunately, what exactly is meant by this phrase is open to interpretation. In *United States v. Turner*,¹³ the court stated that a search incident to arrest must be conducted “at about the same time as the arrest.”¹⁴ While very general, this comment reiterates the Supreme Court’s mandate that, when a search is too remote in time or place from the arrest, the search cannot be justified as incident to the arrest.¹⁵ Whether a search was “substantially contemporaneous,” is an issue that must be reviewed in light of the

⁶ *New York v. Belton*, 453 U.S. 454, 460 (1981)(emphasis added)

⁷ *Id*

⁸ See *Robinson*, 414 U.S. at 235; *McCardle v. Haddad*, 131 F.3d 43 (2nd Cir. 1997)(Search incident to arrest not valid where 10 minute detention in backseat of patrol vehicle did not amount to an arrest)

⁹ *Robinson*, 414 U.S. at 228

¹⁰ 525 U.S. 113 (1998)

¹¹ *Id.* at 117

¹² *Belton*, 453 U.S. at 460. See also *Stoner v. California*, 376 U.S. 483, 486 (1964) and *Preston v. United States*, 376 U.S. 364, 367-368 (1964)

¹³ 926 F.2d 883 (9th Cir.), *cert. denied*, 502 U.S. 830 (1991)

¹⁴ *Id.* at 887

¹⁵ *Preston*, 376 U.S. at 367 (“Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest”)

Fourth Amendment's general reasonableness requirement, taking into consideration all of the circumstances surrounding the search. Thus, while a search conducted 15 minutes after an arrest might be valid in one case,¹⁶ a search 30 to 45 minutes after the arrest might be invalid in another.¹⁷ Among the factors to be considered in determining whether a search was "contemporaneous" with the arrest are where the search was conducted; when the search was conducted in relation to the arrest; and whether the defendant was present at the scene of the arrest during the search. For example, in *United States v. Willis*,¹⁸ the search of a vehicle was upheld because, among other things, the search was conducted before the defendant was transported to the police station. Alternatively, in *United States v. Lugo*,¹⁹ the search of the defendant's vehicle was found invalid where the defendant had been removed from the scene of the arrest. In sum, if it can be safely accomplished, the search incident to arrest should be conducted at the scene of the arrest, as soon as possible after the arrest, and before the defendant is removed from the area.

SCOPE

Chimel established that a search incident to arrest may be conducted on the arrestee's person and those areas "within the immediate control of the arrestee" at the time of the arrest. In *Belton*, the Supreme Court established the following bright-line rule for vehicles: "When a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."²⁰ The Supreme Court additionally held that "the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach."²¹ A "container" was defined in *Belton* as "any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like."²² While this definition did not expressly address "locked" containers, several subsequent federal cases can be interpreted as including locked containers within the scope of a lawful search incident to arrest.²³ Further, two of the Justices who disagreed with the majority's decision in

¹⁶ *Curd v. City of Judsonia*, 141 F.3d 839 (8th Cir.), cert. denied, 525 U.S. 888 (1998)(Warrantless search of purse at police station found to be valid as incident to arrest even though search occurred 15 minutes after the defendant's arrest at home)

¹⁷ *United States v. Vasey*, 834 F.2d 782 (9th Cir. 1987)(Warrantless search held not incident to arrest and invalid when the search took place 30 to 45 minutes after the defendant had been arrested, handcuffed, and placed in patrol vehicle)

¹⁸ 37 F.3d 313 (7th Cir. 1994)

¹⁹ 978 F.2d 631 (10th Cir. 1992)

²⁰ *Belton*, 453 U.S. at 460

²¹ *Id.* (citation omitted)(footnote omitted)

²² *Id.* at 453 U.S. at 461 n4

²³ See *Knowles*, 525 U.S. at 118 (Law enforcement officers may "even conduct a full search of the passenger compartment, including any containers therein, pursuant to a custodial arrest")(emphasis added); *United States v. Tavalacci*, 895 F.2d 1423 (D.C. Cir. 1990)(locked bag); *United States v. Gonzalez*, 71 F.3d 819 (11th Cir. 1996)(*Belton* rule allowed searches of glove boxes, locked or unlocked); *United States v. Valiant*, 873 F.2d 205 (8th Cir. 1989)(locked briefcase was closed container within the vehicle that could be lawfully searched incident to arrest); and *United States v. Woody*, 55 F.3d 1257 (7th Cir. 1995)(search of locked glove box reasonable during search incident to arrest)

Belton seemed to concede that locked containers fall within the parameters outlined in that case.²⁴ The trunk of a vehicle, however, is not within the immediate control of an arrestee and cannot be searched during a search incident to arrest.²⁵

²⁴ *Belton*, 453 U.S. at 469 (Brennan, J., dissenting)(Noting that result in *Belton* would have been the same even if “search had extended to locked luggage or other inaccessible containers located in the back seat of the car”); *Id.* at 453 U.S. 472 (White, J., dissenting)(*Belton* rule allows “interior of the car and any container found therein, whether locked or not” to be searched incident to lawful arrest)

²⁵ *Id.* at 461 n.4 (“Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk”). See also *United States v. Thompson*, 906 F.2d 1292 (8th Cir.), *cert. denied*, 498 U.S. 989 (1990); *United States v. Hernandez*, 901 F.2d 1217 (5th Cir. 1990); *United States v. Schechter*, 717 F.2d 864 (3rd Cir. 1983); *United States v. Freire*, 710 F.2d 1515 (11th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984); and *United States v. Wright*, 932 F.2d 868 (10th Cir. 1991)

SEARCHING A VEHICLE WITHOUT A WARRANT

Inventory Searches

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In this article of the *Quarterly Review*, I will discuss searching a vehicle without a warrant during an inventory search. Again, in discussing this exception to the Fourth Amendment's warrant requirement, the background, requirements, and scope of the search will be addressed. With regard to the scope of the search, the articles will focus on four specific areas: The passenger compartment of the vehicle; the trunk of the vehicle; unlocked containers located in the vehicle; and locked containers located in the vehicle.

BACKGROUND

Inventory searches are a "well-defined exception to the warrant requirement of the Fourth Amendment."¹ Where evidence is found during a lawfully conducted inventory search, it may be used against the defendant in a later trial. In *South Dakota v. Opperman*,² the Supreme Court outlined three justifications for allowing law enforcement officers to inventory lawfully impounded property without first obtaining a warrant. First, there is a need for law enforcement to protect the owner's property while it remains in police custody. Second, an inventory protects the police against claims or disputes over lost or stolen property. And third, an inventory is necessary for the protection of the police from potential dangers that may be located in the property. Because inventory searches are routine, non-criminal procedures whose justification does not hinge on the existence of probable cause, "the absence of a warrant is immaterial to the reasonableness of the search."³ Instead, to be reasonable under the Fourth Amendment, "an inventory must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory."⁴ Thus, where law enforcement officers act "in bad faith or for the sole purpose of investigation,"⁵ an inventory search will be held invalid.

PURPOSES OF INVENTORY SEARCHES

1. Protect Owner's Property While in Law Enforcement Custody;
2. Protect Law Enforcement Against Claims or Disputes Over Lost/Stolen Property; and
3. Protect Law Enforcement From Potential Dangers Located in the Property.

REQUIREMENTS

In order to conduct an inventory search on a vehicle, two (2) requirements must be met. First, the vehicle must have been lawfully impounded. There are a variety of reasons why law enforcement officers may lawfully impound a vehicle. As a practical matter, "the contact with

¹ *Colorado v. Bertine*, 479 U.S. 367, 371 (1987)

² 428 U.S. 364, 369 (1976)

³ *Illinois v. Lafayette*, 462 U.S. 640, 643 (1983)

⁴ *Florida v. Wells*, 495 U.S. 1, 4 (1990)

⁵ *Bertine*, 479 U.S. at 373

vehicles by federal law enforcement officers usually, if not always, involves the detection or investigation of crimes unrelated to the operation of a vehicle.”⁶ In these types of cases, the federal law enforcement officer may arrest the individual and impound the vehicle, should there be no other person available to take control of it. Unlike federal law enforcement officers, however, “state and local police officers ... have much more contact with vehicles for reasons related to the operation of vehicles themselves.”⁷ These state and local officers may impound vehicles for a variety of reasons unrelated to any criminal investigation.

In the interests of public safety and as part of what the Court has called ‘community caretaking functions,’ automobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities. Police will also frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic.⁸

The second requirement of a valid inventory search is that the inventory be conducted in accordance with a standardized inventory policy aimed at accomplishing the justifications for inventory searches.

The underlying rationale for allowing an inventory exception to the Fourth Amendment warrant rule is that police officers are not vested with discretion to determine the scope of the inventory search. This absence of discretion ensures that inventory searches will not be used as a purposeful and general means of discovering evidence of crime.⁹

While the law enforcement agency involved must have a “standardized” inventory policy, several courts have upheld unwritten standardized policies.¹⁰ Nonetheless, as a practical matter, the best way for a law enforcement agency to avoid difficulty with this particular requirement would be to reduce their standardized inventory policy to writing. Finally, law enforcement agencies may establish their own standardized policies, so long as they are reasonably constructed to accomplish the goals of inventory searches and are conducted in good faith.

SCOPE

The scope of an inventory search is defined by the standardized inventory policy of the particular agency involved. As a general rule, however, inventory searches may not extend any further than is reasonably necessary to discover valuables or other items for safekeeping. For

⁶ *Cady v. Dombrowski*, 413 U.S. 433, 440 (1973)

⁷ *Id.* at 441

⁸ *Opperman*, 428 U.S. at 368-369 (footnote omitted)

⁹ *Bertine*, 479 U.S. at 376 (Blackmun, J., concurring)(citation omitted)

¹⁰ See, e.g., *United States v. Griffith*, 47 F.3d 74 (2nd Cir. 1995); *United States v. Frank*, 864 F.2d 992 (3rd Cir. 1988); and *United States v. Ford*, 986 F.2d 57 (4th Cir. 1993)

example, law enforcement officers are not justified in looking into the heater ducts or inside the door panels of a vehicle, in that valuables are not normally kept in such locations. The Supreme Court has upheld inventory searches of the passenger compartments of vehicles.¹¹ Additionally, inventory searches of the trunk have also been found valid.¹² Finally, inventory searches of containers, locked or unlocked, may be conducted, so long as the standardized inventory policy permits.¹³

¹¹ *Opperman*, 428 U.S. at 376; *Bertine*, 479 U.S. at 376. See also *United States v. Patterson*, 140 F.3d 767, 773 (8th Cir), *cert. denied*, 525 U.S. 907 (1998)

¹² *Dombrowski*, 413 U.S. at 448; *United States v. Judge*, 864 F.2d 1144, 1146 (5th Cir. 1989); and *Goodson v. City of Atlanta*, 763 F.2d 1381, 1386 (11th Cir. 1985)

¹³ *Opperman*, 428 U.S. at 371 (“When the police take custody of any sort of container [such as] an automobile ... it is reasonable to search the container to itemize the property to be held by the police”); *Bertine*, 479 U.S. at 376; *Lafayette*, 462 U.S. at 648; and *Wells*, 495 U.S. at 4.

SEARCHING A VEHICLE WITHOUT A WARRANT

Consent Searches

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BACKGROUND

“It is well-settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.”¹ When a law enforcement officer obtains valid consent to search a vehicle, neither reasonable suspicion, nor probable cause, is required. Thus, “in situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by valid consent may be the only means of obtaining important and reliable evidence.”²

REQUIREMENTS

There are two requirements for a consent search to be valid. First, the consent must be voluntarily given. Both “the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force.”³ In making this determination, courts will look at the “totality of the circumstances” surrounding the giving of the consent, because “it is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced.”⁴ Factors to consider in making this determination include, but are not limited to, the age, education, and intelligence of the individual;⁵ the individual’s knowledge of his or her right to refuse to give consent;⁶ whether the individual cooperated in the search;⁷ whether the suspect was in custody at the time the consent was given;⁸ the suspect’s belief that no incriminating evidence will be found;⁹ the presence of coercive police procedures, such as displaying weapons or using force;¹⁰ and the suspect’s experience in dealing with law enforcement officers.¹¹ Additionally, a law enforcement officer who has lawfully detained a suspect during a vehicle stop is not required to inform the suspect that he or she is free to leave before obtaining a valid consent to search.¹² If a suspect is under arrest, there is no requirement that law enforcement officers notify the individual of his or her *Miranda* rights¹³ prior to requesting consent, even if the individual has previously invoked his

¹ *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)(citation omitted)

² *Id.* at 227

³ *Id.* at 228

⁴ *Id.* at 223

⁵ *Id.* at 226

⁶ *Id.* at 227

⁷ *United States v. Carrate*, 122 F.3d 666, 670 (8th Cir. 1997)(Suspect “idly stood by while the troopers searched his car, never indicating that he objected to the search”)

⁸ *Id.*

⁹ *United States v. Asibor*, 109 F.3d 1023, 1038 n.14 (5th Cir.), *cert. denied*, 522 U.S. 902 (1997)(Explaining six factors analyzed to determine voluntariness of consent)

¹⁰ *Id.* See also *Orhorhaghe v. Immigration and Naturalization Service*, 38 F.3d 488, 500 (9th Cir. 1994)

¹¹ *United States v. Barnett*, 989 F.2d 546, 556 (1st Cir. 1993)

¹² *Ohio v. Robinette*, 519 U.S. 33, 40 (1996)

¹³ *Miranda v. Arizona*, 384 U.S. 436 (1966)

right to silence or right to counsel. “A consent to search is not the type of incriminating statement toward which the Fifth Amendment is directed. It is not in itself ‘evidence of a testimonial or communicative nature.’”¹⁴

Further, “there can be no effective consent to a search or seizure if that consent follows a law enforcement officer’s assertion of an independent right to engage in such conduct.”¹⁵ For example, if an individual gives consent only after a law enforcement officer asserts that he or she has a warrant, the consent is not truly being given voluntarily, because the officer is “announcing in effect that the [individual] has no right to resist the search.”¹⁶ In *Orhorhaghe v. Immigration and Naturalization Service*,¹⁷ the court found that the suspect’s consent had not been voluntarily given because, among other things, a law enforcement officer had informed him “he (the officer) didn’t need a warrant.” This statement on the part of the law enforcement officer “constituted ... an implied claim of a right to conduct the search.”¹⁸ The burden of proving that the consent was voluntarily given rests with the prosecutor, and “cannot be discharged by showing no more than acquiescence to a claim of lawful authority.”¹⁹

The second requirement for a consent search is that the consent must be given by an individual with either actual or apparent authority over the place to be searched. “Actual” authority may be obtained “from the individual whose property is searched.”²⁰ Additionally, consent to search may be given by a third-party “who possesses common authority over or other sufficient relationship to the ... effects sought to be inspected.”²¹ As noted by the Supreme Court in *United States v. Matlock*:²²

Common authority is, of course, not to be implied from the mere property interest a third-party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements ..., but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.²³

¹⁴ *United States v. Lemon*, 550 F.2d 467, 472 (9th Cir. 1977). See also *Cody v. Solem*, 755 F.2d 1323, 1330 (8th Cir.), cert. denied, 474 U.S. 833 (1985) (“Simply put, a consent to search is not an incriminating statement”); *Smith v. Wainwright*, 581 F.2d 1149, 1152 (5th Cir. 1978) (“A consent to search is not a self-incriminating statement”); *United States v. Faruolo*, 506 F.2d 490, 495 (2nd Cir. 1974) (“There is no possible violation of Fifth Amendment rights since consent to search is not ‘evidence of a testimonial or communicative nature.’”); and *United States v. Glenna*, 878 F.2d 967, 971 (7th Cir. 1989).

¹⁵ *Orhorhaghe*, *supra* at note 15. See also *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968)

¹⁶ *Bumper*, 391 U.S. at 550

¹⁷ *Supra*, at note 15

¹⁸ *Id.* at 501

¹⁹ *Bumper*, 391 U.S. at 550

²⁰ *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990)(citation omitted)

²¹ *United States v. Matlock*, 415 U.S. 164, 171 (1974)

²² *Id.*

²³ *Id.* at 171 n.7

Within the context of vehicle searches, third-party consent most commonly arises in two distinct situations. In the first, a third-party has sole possession and control of the vehicle of another. In that case, the third-party has the authority to consent to a search of the vehicle²⁴ and any evidence discovered during the consensual search may be used against the actual owner of the vehicle.²⁵

By relinquishing possession to another, the owner or lessee of the vehicle evidences an abandonment of his or her privacy interest in the vehicle; thus, it is reasonable to conclude that the third party to whom possession was surrendered was also given authority to consent to a search of all areas of the vehicle.²⁶

In a second, but distinct, third-party consent scenario, the third-party driver of the vehicle consents to a search while the owner is present as a passenger. In such a case, “it is clear ... that even if the owner/lessee is present as a passenger, the driver of a vehicle has some amount of joint access to the vehicle, and, in fact, the driver has immediate control over the vehicle.”²⁷ Nonetheless, a critical factor considered by the courts in these scenarios is whether the owner/passenger objected to the search. If so, the driver’s consent is most likely inadequate. However, where the owner/passenger remained silent during the search, courts are inclined to find the driver’s consent valid. For example, in *United States v. Fuget*,²⁸ the court noted that:

The driver of a car has the authority to consent to a search of that vehicle. As the driver, he is the person having immediate possession of and control over the vehicle. The ‘driver may consent to a full search of the vehicle, including its trunk, glove box and other components.’ This is true even when some other person who also has control over the car is present, if the other person remains silent when the driver consents and does not object to the search.²⁹

Finally, a law enforcement officer may obtain consent from an individual who has “apparent” authority over the place or item to be searched. This typically occurs when a law enforcement officer conducts a warrantless search of a vehicle based upon the consent of a third-party whom the officer, at the time of the search, reasonably, but erroneously, believed possessed common authority over the vehicle.³⁰ If the officer’s belief that the third-party had authority to consent is “reasonable,” considering all of the facts available at the time the search is conducted, the search will still be valid.

²⁴ *United States v. Morales*, 861 F.2d 396, 399 n.8 (3rd Cir. 1988); *United States v. Diaz-Albertina*, 772 F.2d 654, 658-659 (10th Cir. 1985), *cert. denied*, 484 U.S. 822 (1987)

²⁵ *Matlock*, 415 U.S. at 170

²⁶ *United States v. Dunkley*, 911 F.2d 522, 526 (11th Cir. 1990)(per curiam), *cert. denied*, 498 U.S. 1096 (1991)(citation omitted)

²⁷ *Id.*

²⁸ 984 F.2d 943, 948 (8th Cir. 1993)

²⁹ *Id.* (citations omitted). See also *Dunkley*, *supra* at 526 (Driver’s consent valid where passenger with superior possessory interest failed to object, thus confirming that driver “had the requisite authority to consent to the search of the vehicle”); *Morales*, *supra* at 400 (Passenger’s silence during officer’s inspection of vehicle “material in assessing driver’s authority”)

³⁰ *Rodriguez*, 497 U.S. at 186

SCOPE

The scope of where a law enforcement officer may search is generally controlled by the degree of consent given to the officer. “The standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of ‘objective’ reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?”³¹ An individual may limit the scope of any consent.³² In such a case, the scope of a consent search “shall not exceed, in duration or physical scope, the limits of the consent given.”³³ Should a law enforcement officer fail to comply with the limitations placed on the consent, “the search is impermissible.”³⁴ Individuals may also revoke their consent. When consent is revoked, a law enforcement officer must cease searching, unless another exception to the Fourth Amendment’s warrant requirement is present (e.g., probable cause to search a vehicle).³⁵

When dealing with vehicles, law enforcement officers may specifically ask for permission to search both the passenger compartment of the vehicle, as well as the vehicle’s trunk. If consent is given, a valid search of those areas may proceed. However, a more common scenario in consent search cases involves a law enforcement officer asking, in general terms, for permission to search “the car.” “When an individual gives a general statement of consent without express limitations, the scope of a permissible search is not limitless. Rather, it is constrained by the bounds of reasonableness: what a police officer could reasonably interpret the consent to encompass.”³⁶ When a law enforcement officer asks for permission to “search the car,” and “the consent given in response is general and unqualified, then the officer may proceed to conduct a general search of that [vehicle].”³⁷ In *United States v. Rich*,³⁸ the Fifth Circuit Court of Appeals held that “an individual’s consent to an officer’s request to ‘look inside’ his vehicle is equivalent to general consent to search the vehicle and its contents, including containers such as luggage.”³⁹

The court in *Rich* raises the issue of when a consent search will allow a law enforcement officer to search a container located inside of a vehicle. Turning first to unlocked containers, a law enforcement officer may specifically seek permission to search any unlocked container in the vehicle. If the permission is granted, a search may commence. May a law enforcement officer who seeks general permission from a suspect to “search the car” also search any unlocked containers found within the vehicle? This issue was addressed by the Supreme Court in *Florida*

³¹ *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)[citing *United States v. Ross*, 456 U.S. 798 (1982)]

³² *Id.* at 252 (“A suspect may of course delimit as he chooses the scope of the search to which he consents”). See also *Walter v. United States*, 447 U.S. 649, 656 (1980)(plurality opinion)(“When an official search is properly authorized – whether by consent or by issuance of a valid warrant – the scope of the search is limited by the terms of its authorization”)

³³ ARTICLE, “Supreme Court Review: Fourth Amendment – Expanding the Scope of Automobile Consent Searches,” 82 J. CRIM. L. & CRIMINOLOGY 773, 777 (1992)

³⁴ *United States v. Strickland*, 902 F.2d 937, 941 (11th Cir. 1990)

³⁵ *United States v. Fuentes*, 105 F.3d 487, 489 (9th Cir. 1997)(Suspect effectively revoked consent by shouting “No, wait” before officer could pull cocaine out of pocket)

³⁶ *Strickland*, 902 F.2d at 941

³⁷ Lafave, Wayne, 3 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 8.1(c) p. 610 (1996)

³⁸ *United States v. Crain*, 33 F.3d 480 (5th Cir. 1994)

³⁹ *Id.* at 484

v. Jimeno,⁴⁰ where a law enforcement officer stopped the defendant for a traffic violation. The officer believed that the suspect was carrying drugs in the vehicle and requested permission to search it. The defendant gave the officer permission to search the vehicle, stating that he had “nothing to hide.” While searching, the officer came across a brown paper bag located on the floorboard of the vehicle. He opened it and found cocaine inside. In response to the defendant’s claim that the officer had exceeded the scope of the consent he was given, the Supreme Court held that where a suspect consents to a general search of his vehicle, it is reasonable for an officer to search any unlocked containers located inside the vehicle. According to the Court:

We think it was objectively reasonable for the police to conclude that the general consent to search the respondent’s car included consent to search containers within that car which might bear drugs. A reasonable person may be expected to know that narcotics are generally carried in some form of a container. ‘Contraband goods rarely are strewn across the trunk or floor of a car.’ The authorization to search in this case, therefore, extended beyond the surfaces of the car’s interior to the paper bag lying on the car’s floor.⁴¹

The Court further noted that, if the consent “would reasonably be understood to extend to a particular container,”⁴² a law enforcement officer does not have to specifically request permission to search each closed container found within the vehicle. In *United States v. Snow*,⁴³ the Second Circuit Court of Appeals held that “an individual who consents to a search of his car should reasonably expect that readily-opened, closed containers discovered inside the car will be opened and examined.”⁴⁴

However, law enforcement officers must remember that the individual giving consent must have either actual or apparent authority over the item to be searched. If the individual does not have the requisite authority, the container may not be searched. For example, in *United States v. Welch*,⁴⁵ the driver gave consent to search his rental car. A female passenger in the vehicle had a purse stored in the trunk. Upon opening the purse, the police discovered \$500.00 in counterfeit bills. The woman appealed her conviction, claiming that the police had illegally searched her purse without probable cause or valid consent. The Ninth Circuit Court of Appeals agreed, noting that the key issue in the case was not whether the driver could consent to a search of the vehicle generally, but rather whether the driver “had the *authority*, either actual or apparent, to give effective consent to the search of his companion’s purse.”⁴⁶

By sharing access to and use of the car with McGee, Welch relinquished, in part, her expectation of privacy in the vehicle. McGee’s voluntary consent to a search is sufficient to waive Welch’s Fourth Amendment interests in the car. Welch’s purse is another matter entirely. The fact that she had a limited expectation of privacy in the car by virtue of her sharing arrangement with McGee does not

⁴⁰ *Jimeno*, 500 U.S. at 251

⁴¹ *Id.* (citation omitted)

⁴² *Id.* at 252

⁴³ *United States v. Snow*, 44 F.3d 133 (2nd Cir. 1995)

⁴⁴ *Id.* at 135

⁴⁵ 4 F.3d 761 (9th Cir. 1993)

⁴⁶ *Id.* at 764 (emphasis in original)(footnote omitted)

mean that she had similarly limited privacy expectation in items within the car which are independently the subject of such expectations. The shared control of ‘host’ property does not serve to forfeit the expectation of privacy in containers within that property.⁴⁷

We see that when dealing with passenger’s belongings located in a vehicle, a law enforcement officer must seek a separate consent from that individual to search those containers. A failure to do so may result in a finding that the officer exceeded the scope of the consent given, and the suppression of any evidence found in the container as a result.

The search of a locked container located in a vehicle presents distinct problems for a law enforcement officer. For example, while upholding the officer’s actions in *Jimeno*, the Supreme Court emphasized that the result may have been different had the container in question been locked, such as a locked briefcase: “[I]t is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag.”⁴⁸ In assessing whether the consent given encompassed a locked container, the court will look to the exchange between the law enforcement officer and the suspect, as well as “the manner in which the officer gained access to the container.”⁴⁹ For example, in *United States v. Strickland*,⁵⁰ the Eleventh Circuit Court of Appeals addressed whether it was reasonable for a law enforcement officer to slash the spare tire found in the trunk of the suspect’s vehicle after being given permission for a general search. In finding that the officers exceeded the permissible scope of the consent given, the court stated:

[U]nder the circumstances of this case, a police officer could not reasonably interpret a general statement of consent to search an individual’s vehicle to include the intentional infliction of damage to the vehicle or the property contained within it. Although an individual consenting to a vehicle search should expect that search to be thorough, he need not anticipate that the search will involve the destruction of his vehicle, its parts or contents. Indeed, it is difficult to conceive of any circumstance in which an individual would voluntarily consent to have the spare tire of their automobile slashed. Unless an individual specifically consents to police conduct that exceeds the reasonable bounds of a general statement of consent, that portion of the search is impermissible.⁵¹

Similarly, the court in *Snow*, *supra*, reached the same conclusion, where the searches of a duffel bag and another bag were upheld because, among other things, “no damage to the bags was required to gain access.”⁵²

⁴⁷ *Id.* (citation omitted)

⁴⁸ *Jimeno*, 500 U.S. at 251

⁴⁹ *United States v. Gutierrez-Mederos*, 965 F.2d 800, 804, (9th Cir. 1992), *cert. denied*, 507 U.S. 932 (1993)

⁵⁰ *Supra* at note 38

⁵¹ *Id.* at 941-942

⁵² *Snow*, *supra* at note 48

In sum, it is unreasonable to believe that individuals who give a general consent to search are consenting to having their property damaged or destroyed. When dealing with a locked container, a law enforcement officer should seek express permission to search that item. If the consent is granted, the search may proceed. In order to support the reasonableness of any such search, a law enforcement officer should refrain from damaging or destroying the container in the process of opening it. If a key is necessary, for example, the officer should obtain the key and utilize it to gain access to the container.

SUPREME COURT'S NEW LINE IN THE SAND – MEASURING HEAT EMANATING FROM A HOUSE IS A FOURTH AMENDMENT SEARCH

*Kyllo v. United States*¹

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In January of 1992, a federal agent who suspected Danny Kyllo of growing marijuana in his home used a thermal imager to measure the heat radiating from Kyllo's house. These imagers detect thermal radiation, which virtually all objects emit, and can distinguish between degrees of warmth being emitted. In this case, the agent positioned the imager across the street from Kyllo's home (well off the curtilage) and the results showed that the roof and side walls were both hotter than the rest of the house, and warmer than neighboring homes. Armed with this and other information, the agent believed that Kyllo was growing marijuana using halide lights and applied for, and was granted, a search warrant.

The subsequent search of Kyllo's residence revealed an indoor marijuana growing operation involving 100 plants. Kyllo was indicted on one count of manufacturing marijuana, in violation of Title 21 U.S.C. § 841(a)(1), and before trial moved to suppress the evidence. The motion was denied, and nine years after the heat was measured, the United States Supreme Court agreed to decide whether detecting heat emanating from a home is a reasonable search within the meaning of the Fourth Amendment.

The Fourth Amendment provides, in part, that the right of the people to be secure in their houses against unreasonable searches shall not be violated. Not until 1967, in the case of *Katz v. United States*, did the Supreme Court first set out the principal that a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable. Since *Katz*, the Supreme Court has given guidance on what reasonable expectation of privacy (REP) in a house really means on issues ranging from how high does REP reach (400 – 1000 feet up) to where does it end (off the curtilage). With this as a backdrop, the *Kyllo* case presented a unique issue, in that the emanating heat was being measured from off the curtilage, yet the heat itself was clearly being produced in the house. It is also clear that Kyllo expected privacy and that society, led by the Supreme Court, has always recognized that the most important area of REP is a person's home. However, starting with *Katz*, the Courts have also said that anything exposed to the public, or to law enforcement officers who are lawfully present, even if in an area of REP, has lost its Fourth Amendment protections (the Plain View Doctrine).

On June 11, 2001, the Supreme Court announced (in a narrow 5-4 decision with the very unusual grouping of Justices Scalia, Souter, Thomas, Ginsburg, and Breyer joining together in the opinion) that this thermal imaging constituted a violation of the Fourth Amendment. In the opinion, the Justices concluded that the use by the government of a device that is not in general public use to explore the details of the inside of a home, that would have been previously

¹ 533 U.S. 27 (2001)

unknowable without physical intrusion, violates one's REP and is an unreasonable search within the meaning of the Fourth Amendment.

What does this mean for law enforcement? It clearly means we can't use thermal imagers to measure heat coming from a house. More significantly, the Court's opinion seems to imply that any intrusion by law enforcement into an area of high REP (a house) by use of a device not in general public use could present a Fourth Amendment problem. In the opinion, the Justices reiterated that the Fourth Amendment draws a firm line at the entrance to the house (whether we are walking in or measuring heat coming out) and that to do any intrusive type of surveillance requires a warrant based upon probable cause. With recent and projected rapid advances in surveillance technology, it is reasonable to suspect that the Supreme Court will be dealing with more of these types of cases in the future, particularly when dealing with REP areas (not homes) where the Court has indicated that people have a little less expectation of privacy.

When the States ratified the Fourth Amendment in 1791, who amongst America's founders could have imagined what we would be dealing with in the area of search and seizure 210 years later. Yet, maybe they did have a clue, and maybe that's why they artfully used the word "unreasonable" in the Fourth Amendment, a word that has been the subject of more interpretation by the Supreme Court than just about all the other words in the Constitution put together. Stay tuned!

WARRANTLESS WORKPLACE SEARCHES OF GOVERNMENT EMPLOYEES

Bryan R. Lemons
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This is the first of a two-part article on government workplace searches.

Can government employees have a reasonable expectation of privacy in their offices, desks, computers, and filing cabinets? If such an expectation of privacy does exist, what standards must a supervisor follow to lawfully conduct a warrantless search of those areas? Must a supervisor have probable cause to search a government employee's workplace? Or is a search permitted on some lesser standard of suspicion? The Supreme Court addressed these questions in *O'Connor v. Ortega*.¹ The purpose of this article is to provide a framework within which the principles outlined in *O'Connor* for "workplace"² searches by government supervisors can be understood and applied.

When a government supervisor is considering the search of a government employee's workspace, a two-part analysis can be utilized to simplify the process. First, determine whether the employee has a reasonable expectation of privacy in the area to be searched. If a reasonable expectation of privacy does exist, then consider how that expectation can be defeated.

I. DOES A REASONABLE EXPECTATION OF PRIVACY EXIST?

A "reasonable expectation of privacy" exists when (1) an individual exhibits an actual expectation of privacy, and (2) that expectation is one that society is prepared to recognize as being reasonable.³ If either of these two prongs is not met, then no expectation of privacy exists, and the Fourth Amendment is not implicated.⁴ Government employees can, and often do, establish expectations of privacy in their government offices, desks, computers, and filing cabinets.⁵ A cursory glance into any government office will show that individual government employees typically expect some form of privacy, based on the intermingling of their personal and professional lives (e.g., pictures of kids on desks and diplomas on walls). Many government agencies allow, if not encourage, individuals to perform some personal business while in a governmental workplace to promote efficiency, such as using a government telephone to make a

¹ 480 U.S. 709 (1987)(plurality)

² "Workplace," as used in this article, "includes those areas and items that are related to work and are generally within the employer's control." *Id.* at 715 (plurality opinion). This would generally include such areas as offices, desks, filing cabinets, and computers. However, "not everything that passes through the confines of the business address can be considered part of the workplace context." *Id.* at 716. A government employee would continue to have an expectation of privacy in his or her personal belongings that might have been brought into the workplace environment. Thus, "the appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage, a handbag, or a briefcase that happens to be within the employer's business address." *Id.*

³ *Katz v. United States*, 389 U.S. 347, 361 (1967)(J. Harlan, concurring)

⁴ *Illinois v. Andreas*, 463 U.S. 765, 771 (1983)("If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no 'search' subject to the Warrant clause")

⁵ See, e.g., *McGregor v. Greer*, 748 F. Supp. 881, 888 (D.D.C. 1990)(Reiterating *O'Connor's* holding that "a government employee may be entitled to a reasonable expectation of privacy in her office")

personal phone call during a lunch hour. Nonetheless, a government employee's expectation of privacy is limited by the "operational realities of the workplace,"⁶ and "whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis."⁷ Although government ownership of the property to be searched (e.g., a government-owned computer assigned to a government employee) is an "important consideration,"⁸ it does not, standing alone, dictate a finding that no reasonable expectation of privacy exists. "Applicability of the Fourth Amendment does not turn on the nature of the property interest in the searched premises, but on the reasonableness of the person's privacy expectation."⁹ Courts have utilized a variety of factors to determine whether a government employee has a reasonable expectation of privacy in his or her workspace. Among the most important are the following:

A. PRIOR NOTICE TO THE EMPLOYEE (LEGITIMATE REGULATION)

In *O'Connor*, the Supreme Court held that an employee's expectation of privacy can be reduced through "legitimate regulation."¹⁰ For example, "government employees who are notified that their employer has retained rights to access or inspect information stored on the employer's computers can have no reasonable expectation of privacy in the information stored there."¹¹ *United States v. Simons*¹² illustrates this point. In *Simons*, the Foreign Bureau of Information Services (FBIS), a division of the Central Intelligence Agency, employed the Defendant. FBIS had an Internet usage policy that (1) specifically prohibited accessing unlawful material, and (2) prohibited use of the Internet for anything other than official business. Further, the policy noted that FBIS would "periodically audit, inspect, and/or monitor the user's Internet access as deemed appropriate."¹³ When a keyword search indicated that Simons had been visiting numerous illicit web sites from his government computer, multiple searches of his hard drive were conducted from a remote location, resulting in the discovery of several pornographic images of minors. Simons challenged the search of his computer, claiming his Fourth Amendment rights had been violated. In rejecting this challenge, the Fourth Circuit Court of Appeals held that Simons "did not have a legitimate expectation of privacy with regard to the record or fruits of his Internet use in light of the FBIS Internet policy."¹⁴ Through its language, "this policy placed employees on notice that they could not reasonably expect that their Internet activity would be private."¹⁵

B. COMMON PRACTICES AND PROCEDURES

⁶ *O'Connor*, 480 U.S. at 717 (plurality)

⁷ *Id.* at 718

⁸ *United States v. Angevine*, 2002 U.S. App. LEXIS 2746 (10th Cir. 2002)

⁹ *Gillard v. Schmidt*, 579 F.2d 825, 829 (3rd Cir. 1978); *see also United States v. Taketa*, 923 F.2d 665, 672 (9th Cir. 1991)(noting that "privacy analysis does not turn on property rights")

¹⁰ *O'Connor*, 480 U.S. at 717 (plurality)

¹¹ *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, Computer Crime and Intellectual Property Section, Criminal Division, Department of Justice at 41 (March 2001). *See also Muick v. Glenayre Electronics*, 2002 U.S. App. LEXIS 1782 (7th Cir. 2002)(Employer's notice that it could inspect employees' laptop computers "destroyed any reasonable expectation of privacy [the employees] might have had.")

¹² 206 F.3d 392 (4th Cir. 2000)

¹³ *Id.* at 396

¹⁴ *Id.* at 398

¹⁵ *Id.*; *See also United States v. Slanina*, 2002 U.S. App. LEXIS 2611 (5th Cir. 2002)

In *O'Connor*, the Supreme Court recognized that “[p]ublic employees’ expectations of privacy in their offices, desks, and file cabinets ... may be reduced by virtue of actual office practices and procedures”¹⁶ Alternatively, common office practices and procedures may permit a government employee to establish an expectation of privacy in an area where one would otherwise not exist. For example, in *United States v. Speights*,¹⁷ the Defendant was a police officer who retained a locker at his police headquarters. Both a personal lock and a lock that had been issued by the department were used to secure the locker. There were no regulations that addressed the issue of personal locks on the police lockers, nor was there any regulation or notice that the lockers could be searched. There was also no regulation as to what a police officer might keep in the locker. Upon receiving information that Speights had a sawed-off shotgun in his locker, the locker was opened with a master key (for the police-issued lock) and bolt cutters (for Speights’ personal lock). A sawed-off shotgun was recovered in the search, and Speights was convicted of illegally possessing the weapon. On appeal, he claimed his Fourth Amendment rights had been violated by the search of his locker. The Third Circuit Court of Appeals agreed, finding that “no regulation and no police practice” existed to justify the search of Speights’ locker. According to the court, “only if the police department had a practice of opening lockers with private locks without the consent of the user would [Speights’] privacy expectation be unreasonable.”¹⁸ While there had been scattered instances of inspections of the lockers for cleanliness (3-4 in 12 years), “there [was] insufficient evidence to conclude that the police department practice negated Speights’ otherwise reasonable expectation of privacy.”¹⁹

C. OPENNESS AND ACCESSIBILITY

Courts will often look to the openness or accessibility of a workspace to determine whether an expectation of privacy can be sustained. Among the factors that are considered are “the employee’s relationship to the item seized; whether the item was in the immediate control of the employee when it was seized; and whether the employee took actions to maintain his privacy in the item.”²⁰ The more accessible the item or area is to others, the less likely it is an individual employee’s claim of privacy would be accepted. The more the item or area in question was given over to an employee’s exclusive use, the more likely an expectation of privacy would be found.

¹⁶ *O'Connor*, 480 U.S. at 717 (plurality); see also *Gillard v. Schmidt*, 579 F.2d 825, 829 (3rd Cir. 1978)(Holding that “an employer may conduct a search in accordance with a regulation or practice that would dispel in advance any expectations of privacy”)(citation omitted)

¹⁷ 557 F.2d 362 (3rd Cir. 1977)

¹⁸ *Id.* at 364

¹⁹ *Id.* Other federal courts in analogous cases have reached parallel conclusions. For example, in *United States v. Donato*, 269 F. Supp. 921 (E.D. Pa.), *aff’d*, 379 F.2d 288 (3rd Cir. 1967), the search of a locker maintained by an employee of the United States Mint was upheld because, among other things, the locker was “regularly inspected by the Mint security guards for sanitation purposes.” Likewise, in *Shaffer v. Field*, 339 F. Supp. 997 (C.D. Cal. 1972), *aff’d*, 484 F.2d 1196 (9th Cir. 1973), the search of a police officer’s locker was upheld in part because three previous searches had been conducted in the past. Both of these cases “relied on specific regulations and practices in finding that an expectation of privacy was not reasonable.” 557 F.2d at 365. See also *United States v. Taketa*, 923 F.2d 665, 673 (9th Cir. 1991)(Holding that government employee had a reasonable expectation of privacy in his office because, *inter alia*, the office was “not open to the public and was not subjected to regular visits of inspection by DEA personnel”) and *Schowengerdt v. United States*, 944 F. 2d 483, 488 (9th Cir. 1991)(Holding no reasonable expectation of privacy in office or credenza due to “extremely tight security procedures,” to include “frequent scheduled and random searches by security guards”)

²⁰ *United States v. Angevine*, 2002 U.S. App. LEXIS 2746 (10th Cir. 2002)

As a general rule, “where a public employee has his or her own office or desk which co-workers and superiors normally do not enter, and where no agency policy or regulation warns the employee that an expectation of privacy is unreasonable, an expectation of privacy may be reasonable.”²¹ Offices that are “continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits ... may be so open to fellow employees or the public that no expectation of privacy is reasonable.”²²

“Ordinarily, business premises invite lesser privacy expectations than do residences.”²³ Where areas are, by their very nature, “open” and “public,” no reasonable expectation of privacy can exist in that area.²⁴ For example, where an unlocked desk or credenza was located in an “open, accessible area,” no reasonable expectation of privacy was found to exist.²⁵ Nonetheless, the existence of a master key will not defeat an employee’s expectation of privacy in his or her office.²⁶ Nor does an employee’s failure to consistently shut and lock the office door automatically sacrifice any expectation of privacy in that area.²⁷ Just because others may be permitted access to an employee’s office does not automatically destroy the employee’s privacy expectation. As one court has noted, “[p]rivacy does not require solitude.”²⁸

D. THE POSITION OF THE EMPLOYEE

Courts will consider the position occupied by the employee who was the subject of the workplace search. This is especially true where the subject of the search is a law enforcement officer. While law enforcement officers do not lose their Constitutional rights by virtue of accepting their position,²⁹ there is a “substantial public interest in ensuring the appearance and actuality of police integrity,” in that “a trustworthy police force is a precondition of minimal social stability in our imperfect society.”³⁰ This “interest in police integrity ... may justify some intrusions on the privacy of police officers which the Fourth Amendment would not otherwise tolerate.”³¹ A case on point is *Biehunik v. Felicetta*,³² involving allegations of police brutality. After several citizens were severely beaten by a large group of police officers, the police commissioner ordered 62 police officers to participate in a lineup for investigative purposes. The officers moved to prevent the lineup, claiming that it violated their Constitutional rights. In

²¹ *McGregor*, 748 F. Supp. at 888.

²² *O’Connor*, 480 U.S. at 717, 718 (plurality)

²³ *Vega-Rodriguez v. Puerto Rico Telephone Company*, 110 F.3d 174, 178 (1st Cir. 1997)[citing *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977)]

²⁴ *Thompson v. Johnson County Community College*, 930 F. Supp. 501, 507 (D. Kan. 1996)(“Security personnel and other college employees, including maintenance and service personnel, had unfettered access to this storage room. Consequently, defendants argue that the open, public nature of the security personnel locker area defeats any reasonable expectation of privacy in this area. The court agrees.”)

²⁵ *O’Bryan v. KTIV Television*, 868 F. Supp. 1146, 1159 (N.D. Iowa 1994)

²⁶ *Taketa*, 923 F.2d at 673 (“Furthermore, the appellants correctly point out that allowing the existence of a master key to overcome the expectation of privacy would defeat the legitimate privacy interest of any hotel, office, or apartment occupant”)

²⁷ *Id.* (“Nor was the expectation of privacy defeated by O’Brien’s failure to shut and lock his door at all times”)

²⁸ *Id.*; See also *United States v. Slanina*, 2002 U.S. App. LEXIS 2611 (5th Cir. 2002)

²⁹ *Garrity v. State of New Jersey*, 385 U.S. 493, 500 (1967)(Law enforcement officers “are not relegated to a watered-down version of Constitutional rights”)

³⁰ *Biehunik v. Felicetta*, 441 F.2d 228, 230 (2d Cir. 1971)

³¹ *Kirkpatrick v. The City of Los Angeles*, 803 F.2d 485, 488 (9th Cir. 1986)

³² *Supra*, at note 30

rejecting the officers' argument, the court noted, "policemen, who voluntarily accept the unique status of watchman of the social order, may not reasonably expect the same freedom from governmental restraints which are designed to ensure his fitness for office as from similar governmental actions not so designed."³³

A similar result was reached by the same court, albeit it in a different context, in *Sheppard v. Beerman*.³⁴ Sheppard, a law clerk, brought a civil action against the judge for whom he clerked, alleging that the judge impermissibly searched his desk in violation of the Fourth Amendment. In holding that Sheppard had no reasonable expectation of privacy in the desk, the court relied upon the unique "working relationship between a judge and her clerk."³⁵

"Unlike a typical employment relationship ..., in order for a judicial chambers to function efficiently, an absolute free flow of information between the clerk and the judge is usually necessary. Accordingly, the clerk has access to all the documents pertaining to a case. In turn, the judge necessarily has access to the files and papers kept by the clerk, which will often include the clerk's notes from discussions with the judge. Because of this distinctive open access to documents characteristic of judicial chambers, we agree with the district court's determination that Sheppard had 'no reasonable expectation of privacy in chambers' appurtenances, embracing desks, file cabinets or other work areas."³⁶

E. WAIVER OF RIGHTS

Occasionally, a government employee may actually waive his or her expectation of privacy as a precondition of receiving a certain benefit from their employer. In *American Postal Workers Union v. United States Postal Service*³⁷, postal employees were eligible to receive personal lockers at their postal facility. Before being allowed to do so, however, each employee had to sign a waiver that noted the locker was "subject to inspection at any time by authorized personnel."³⁸ Further, the administrative manual of the Postal Services noted that all property provided by the Postal Service was "at all times subject to examination and inspection by duly authorized postal officials in the discharge of their official duties."³⁹ Finally, the collective

³³ *Id.* at 231

³⁴ 18 F.3d 147 (2d Cir. 1994)

³⁵ *Id.* at 152

³⁶ *Id.*

³⁷ 871 F.2d 556 (6th Cir. 1989)

³⁸ *Id.* at 557

³⁹ *Id.*

bargaining agreement for these employees “provided for random inspection of lockers under specified circumstances.”⁴⁰ As noted by the court: “In light of the clearly expressed provisions permitting random and unannounced locker inspections under the conditions described above, the collective class of plaintiffs had no reasonable expectation of privacy in their respective lockers that was protected by the Fourth Amendment.”⁴¹

⁴⁰ *Id.*

⁴¹ *Id.* at 560

WARRANTLESS WORKPLACE SEARCHES OF GOVERNMENT EMPLOYEES PART II

*Bryan R. Lemons
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Part I of this article discussed different factors to consider when deciding whether a government employee has a reasonable expectation of privacy in a government “workplace.”¹ If no expectation of privacy exists, the Fourth Amendment is not implicated.² However, government employees can, and often do, establish expectations of privacy in their government offices, desks, computers, and filing cabinets.³ Part II of this article examines the ways in which a government supervisor may defeat a government employee’s expectation of privacy in a government workplace.

II. IF A REASONABLE EXPECTATION OF PRIVACY DOES EXIST, HOW CAN THAT EXPECTATION BE DEFEATED?

“The Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer.”⁴ If a reasonable expectation of privacy exists in the workplace, the courts will scrutinize the motivations behind the supervisor’s search to determine if the warrantless search is valid. “The ‘special needs’ of public employers may ... allow them to dispense with probable cause and warrant requirements when conducting workplace searches related to investigations of work-related misconduct.”⁵ As noted by the Supreme Court:

“In our view, requiring an employer to obtain a warrant whenever the employer wished to enter an employee’s office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome. Imposing unwieldy warrant procedures in such cases upon

¹ “Workplace,” as used in this article, “includes those areas and items that are related to work and are generally within the employer’s control.” *O’Connor v. Ortega*, 480 U.S. 709, 715 (plurality opinion). This would generally include such areas as offices, desks, filing cabinets, and computers. However, “not everything that passes through the confines of the business address can be considered part of the workplace context.” *Id.* at 716. A government employee would continue to have an expectation of privacy in his or her personal belongings that might have been brought into the workplace environment. Thus, “the appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage, a handbag, or a briefcase that happens to be within the employer’s business address.” *Id.*

² *Illinois v. Andreas*, 463 U.S. 765, 771 (1983)(“If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no ‘search’ subject to the Warrant clause”).

³ See, e.g., *McGregor v. Greer*, 748 F. Supp. 881, 888 (D.D.C. 1990)(Reiterating *O’Connor’s* holding that “a government employee may be entitled to a reasonable expectation of privacy in her office”).

⁴ *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989)

⁵ *Leventhal v. Knapek*, 266 F.3d 64, 73 (2d Cir. 2001)(citation omitted). See also *United States v. Reilly*, 2002 U.S. Dist. LEXIS 9865, 9875 (S.D.N.Y. 2002)(“Although the Fourth Amendment generally requires a warrant and probable cause, there are some well-established exceptions to these requirements. One such exception applies to the government’s interest in the efficient and proper operation of a government workplace”).

supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable.”⁶

Thus, the motivation behind the search of the employee’s workplace is key to determining the standard required. In *O’Connor*, the Supreme Court outlined two basic categories of workplace searches: (1) Searches for work-related, non-investigatory purposes, and (2) searches for evidence of criminal violations.

A. SEARCHES FOR WORK-RELATED, NON-INVESTIGATORY PURPOSES

When a search of a government employee’s workplace is conducted for a work-related, non-investigatory purpose, such as retrieving a needed file or investigating work-related misconduct, the search must be reasonable based on the totality of the circumstances.⁷ This standard requires both that the search be reasonable at its inception and that the scope of the search made also be reasonable. As noted by the Supreme Court:

“Ordinarily, a search of an employee’s office by a supervisor will be ‘justified at its inception’ when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a non-investigatory, work-related purpose, such as to retrieve a needed file.”⁸

Additionally, a search will be “permissible in scope” when “the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of ... the nature of the [misconduct].”⁹

B. SEARCHES FOR EVIDENCE OF CRIMINAL VIOLATIONS

In *O’Connor*, the Supreme Court “specifically declined to ‘address the appropriate standard when an employee is being investigated for criminal misconduct or breaches of other nonwork-related or regulatory standards.’”¹⁰ Nonetheless, “the distinction between searches and seizures for purpose of criminal prosecution and those undertaken for work-related or administrative purposes is critical and many courts upholding a standard lower than probable cause have recognized the lower standard is not appropriate in the criminal arena.”¹¹ “Accordingly, in the criminal context, the appropriate standard for searches and seizures involving work-related misconduct is probable cause.”¹² Where the sole motivation behind the

⁶ *O’Connor*, 480 U.S. at 722 (plurality)

⁷ *Id.* at 725, 726 (plurality)

⁸ *O’Connor*, 480 U.S. at 726 (plurality)

⁹ *Id.* (plurality)

¹⁰ *United States v. Slanina*, 2002 U.S. App. LEXIS 2611 (5th Cir. 2002)

¹¹ *Cerrone v. Cahill*, 84 F. Supp. 2d 330, 336 (N.D.N.Y. 2000). See also *United States v. Taketa*, 923 F.2d 665, 675 (9th Cir. 1991) (“The rationale for the lesser burden *O’Connor* places on public employers is not applicable for federal agents engaged in a criminal investigation. The DEA cannot cloak itself in its public employer robes in order to avoid the probable cause requirement when it is acquiring evidence for a criminal prosecution”).

¹² *Id.* at 337

search is to uncover evidence of criminal wrongdoing, “the traditional requirements of probable cause and warrant are applicable.”¹³

C. “MIXED MOTIVE” SEARCHES

While the standards set out above appear relatively clear, there are often situations in which a government employee’s misconduct might well fit into both of the above categories. In other words, the employee is engaged in administrative misconduct that is also criminal in nature. “The courts have adopted fairly generous interpretations of *O’Connor* when confronted with mixed-motive searches.”¹⁴ For example, in *United States v. Reilly*,¹⁵ the defendant was accessing child pornography from his government computer, a clear violation of the Department of Labor’s computer use policy. Two diskettes were seized from the defendant, both of which were later found to contain child pornography. His motion to suppress the two diskettes was denied. The court found the search of these diskettes fell within *O’Connor*’s “work-related misconduct” exception: “Agent Wager’s dual role as an investigator of workplace misfeasance and criminal activity does not invalidate the otherwise legitimate workplace search.”¹⁶

Similarly, in *United States v. Simons*,¹⁷ the court upheld a search of a government employee’s office even “assum[ing] that the dominant purpose of the warrantless search of Simons’ office was to acquire evidence of criminal activity.”¹⁸

Nevertheless, the search remains within the *O’Connor* exception to the warrant requirement; FBIS did not lose its special need for ‘the efficient and proper operation of the workplace,’ merely because the evidence obtained was evidence of a crime. Simons’ violation of FBIS’ Internet policy happened also to be a violation of criminal law; this does not mean that FBIS lost the capacity and interests of an employer.¹⁹

¹³ *Id.* at 336 (citation omitted)

¹⁴ *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, Computer Crime and Intellectual Property Section, Criminal Division, Department of Justice at 45 (March 2001)

¹⁵ *Supra* at note 5

¹⁶ *Id.* at 9881

¹⁷ 206 F.3d 392 (4th Cir. 2000), *cert. denied*, 122 S. Ct. 292 (2001)

¹⁸ *Id.* at 400

¹⁹ *Id.* (internal quotations and citations omitted)

PROTECTIVE SWEEPS and ARREST SEARCHES

The Legacy of *Maryland v. Buie*¹

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On February 3, 1986, two men, Buie and Allen, committed an armed robbery of a restaurant in Maryland. One of them was wearing a red running suit. That same day, police obtained arrest warrants for the two. On February 5, police executed the arrest warrant for Buie. Once inside Buie's house, officers fanned out through the first and second floors. An officer twice shouted into the basement, ordering anyone down there to come out. Buie finally emerged from the basement and was arrested, searched, and handcuffed. Thereafter, a second officer entered the basement "in case there was someone else" down there. He noticed a red running suit lying on a stack of clothing and seized it.

Buie had an expectation of privacy in that area of his house. However, such rooms are not immune from entry. The privacy interest must be balanced against the

interest of the officers in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack. The risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter.²

In holding that the red running suit was admissible as seized in "plain view," the Court held that police officers have a limited right to conduct a "protective sweep" for their own safety, stating that

... as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. This is no more and no less than was required in *Terry*³ and *Long*⁴, and as in those cases, we think this balance is the proper one.⁵

These words have been interpreted as giving rise to "two prongs" of *Buie*.

¹ *Maryland v. Buie*, 494 U.S. 325 (1990)

² *Id.* at 333

³ *Terry v. Ohio*, 392 U.S. 1 (1968)

⁴ *Michigan v. Long*, 463 U.S. 1032 (1983)

⁵ *Buie* at 334.

The first prong is the “search incident to arrest,” which is predicated solely on the arrest. Did the Court really mean what a plain reading of these words indicates - that the scope of a “search incident to arrest” is now expanded beyond the *Chimel*⁶ “lunging distance”? We will see in Part 3 that the answer is yes.

The second prong is the “protective sweep,” which requires articulable facts which would warrant a reasonably prudent officer in believing that the area to be searched harbors an individual posing a danger to those on the arrest scene.

This three part article examines court cases discussing “protective sweeps” under *Buie*, “searches incident to arrest” under *Buie*, and some cases that have cited *Buie* in support of broader Fourth Amendment / privacy issues. Part 1 includes case examples of protective sweeps held valid under *Buie*. Part 2 will address protective sweeps not complying with *Buie*. Part 3 will examine searches incident to arrest under *Buie* and other *Buie* issues.

PART 1

“PROTECTIVE SWEEP” AS DEFINED IN *BUIE*

The *Buie* Court defined a protective sweep as “... a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding.”⁷

The Court compared the protective sweep to a *Terry* on-the-street frisk and a *Long* roadside frisk of an automobile passenger compartment. In holding that these frisks were reasonable despite the absence of a warrant or probable cause, the Court balanced the immediate interests of the police in protecting themselves from the danger posed by hidden weapons against the Fourth Amendment interests of the persons with whom they were dealing.

CASE EXAMPLES INVOLVING PROTECTIVE SWEEPS

Probable Cause of Danger Not Necessary

In *U.S. v. Tucker*⁸, a team of FBI agents and Oklahoma City Police officers arrived at Defendant’s residence to serve an arrest warrant on him. The arrest team was one of several such teams serving warrants on members of a large-scale drug conspiracy. Officers were told that the suspects had a history of violent behavior and were known to have firearms. When Defendant appeared at the front door, he was instructed to open the locked metal-barred door. He disappeared from sight when he went in search of the key.

The officers heard rustling noises when Defendant was out of sight but could not determine if there were other individuals inside the residence. Defendant finally returned and unlocked the door. Officers ordered him to lie down and began taking him into custody while

⁶ *Chimel v. California*, 395 U.S. 752 (1969)

⁷ *Buie*, at 327

⁸ *U.S. v. Tucker*, 1999 U.S. App. LEXIS 1480 (10th Cir.)

several other officers began a protective sweep of the residence. In one room, officers moved a sofa out from the wall but found no one hiding there. Instead, they observed a pile of cocaine. On the kitchen counter, the agents observed other items of evidence. They completed the protective sweep, which lasted well under five minutes, and removed Defendant to their vehicle.

In upholding the protective sweep, the Court cited *Buie* and stated that it was **not necessary for officers to show “probable cause to believe that a serious and demonstrable potentiality for danger existed.”** An officer must instead possess a “reasonable belief based on specific and articulable facts” that there might be such a threat. The officers were told that the numerous suspects in the alleged conspiracy had a history of violent behavior and were known to possess firearms. Moreover, the Court found that Defendant took an unusually long time out of the officers’ sight when he was searching for the keys, and that the rustling noises could have suggested to the officers that someone else was in the dwelling. The Court was persuaded that these facts supported a reasonable belief of a risk of ambush and, therefore, justified a protective sweep. In looking behind the couch, “the officers didn’t do anything more than look about in places where a human being could be. And they are entitled to look in a closet or open a bathroom door or look behind a bulky piece of furniture.”

Arrest Outside, then Sweep Inside

In *U.S. v. Henry*⁹, the Court dealt with the issue of a **protective sweep where the arrest occurred just outside the door**. A team of United States Marshals and Washington Metropolitan Police Officers, armed with an arrest warrant, went in search of Henry. An informant had notified the Marshals that Henry was staying in apartment # 34, was armed, and might be accompanied by confederates.

The officers began a stakeout of the apartment at 9:30 a.m. At 1:30 p.m., Henry stepped from the apartment into the internal hallway of the building, leaving the door ajar behind him. As Defendant was being arrested, he called out, “They got me.” Five officers stepped into the apartment with Defendant. An officer then conducted what he termed a “security check” of the apartment’s bedroom, bathroom, and kitchen to verify that there were no armed individuals present who might threaten the officers. In the bedroom, he discovered a gun sitting on top of a dresser and, in an open drawer, two bags of a white powdery substance, some of which was later determined to be heroin.

Although *Buie* concerned an arrest made in the home, the principles enunciated by the Supreme Court are fully applicable where, as here, the arrest takes place just outside the residence. The officers’ exact location does not change the nature of the appropriate inquiry: Did articulable facts exist that would lead a reasonably prudent officer to believe a sweep was required to protect the safety of those on the arrest scene?

The Court found sufficient evidence for the officers to objectively fear for their safety after the arrest. The fact that the door was open could cause the officer to believe that anyone inside would be aware that Defendant had been taken into custody, especially as Defendant had

⁹ *United States v. Henry*, 48 F.3d 1282 (D.C. Cir. 1995)

been heard to yell, “They got me.” This information, coupled with the arrest just outside the open door, was sufficient to lead a reasonably prudent policeman to fear that he was vulnerable to attack.

In *U.S. v. Biggs*¹⁰, officers had received information that the Defendant, wanted on a fugitive warrant, was in a local motel room. When the three officers arrived at the motel, Defendant’s truck was parked outside his room. About two hours after the surveillance started, Defendant left his room, barefoot and shirtless, and, leaving the door to the room ajar, went to his truck in the parking lot. The officers arrested Defendant at the truck. After the Defendant was placed in custody at his truck and before taking the Defendant back into the room to get dressed, two of the officers went inside his motel room through the partially open motel room door and conducted a “protective sweep.” During the sweep, a gun was found in plain view in an open suitcase located on the end of one of the beds in the room.

Was it reasonable for the officers to **sweep the motel room 20-75 feet from the arrest site once they had the Defendant under their control?** The officers based the need for the sweep on several articulable factors. First, the officers had received information that another person would be meeting Defendant at the motel room. Although the officers never saw anyone enter the room during the surveillance period, they did not know if someone was already in the room when they arrived. Second, the officers were familiar with Defendant and knew that he had been arrested on two previous occasions in the presence of someone in possession of a firearm. Third, Defendant left the motel room door open so that anyone present in the room had a clear view of the officers, thereby threatening their safety from an unknown person present in the room. Finally, the officers did not act unreasonably in accompanying a shoeless, shirtless man about to be transported to jail back to his motel room. The Defendant had clothes and other personal items to be retrieved. It was only natural, as a matter of common sense, for the officers to go with the Defendant back into the room to retrieve his possessions. The law does not require officers to leave common sense at the door.

Non-Weapon Plain View Seizures

In *U.S. v. Hromada*¹¹, an undercover officer made two small purchases of marijuana from Defendant. There were strong indications that Defendant did not operate alone. On the day of the first drug transaction, Defendant was observed leaving and returning to his home with a woman companion who was present during the sale. Also, during one recorded telephone call to Defendant’s home, the officer overheard Defendant consult with a male at his home about the price he should charge for the drugs. An arrest warrant was obtained for Defendant.

Once Defendant was arrested in the living room, officers fanned out through the house to check all other rooms and areas. They discovered Defendant’s girlfriend in one room, and the roommate in another, and brought them to the living room. During their passage through the house, officers observed an abundance of marijuana plants, high intensity lights, and cultivation equipment in the master bedroom and closet, the master bathroom, and a second bedroom.

¹⁰ *U.S. v. Biggs*, 70 F.3d 913 (6th Cir. 1995)

¹¹ *U.S. v. Hromada*, 49 F.3d 685 (11th Cir 1995)

In upholding the “plain view” seizures, the Court, citing *Buie*, stated that the purpose of the protective sweep of Defendant’s house was to secure it and investigate the officers’ reasonable suspicion of danger. It was also reasonable for them to believe that Defendant’s girlfriend and roommate were inside. Such a reasonable belief that someone else could be inside the house permits a protective sweep.

It is clear from the record that this was not a full-blown search. The officer opened doors only to areas large enough to harbor a person. There is no evidence that the officers opened drawers or that the sweep of the house was too extensive. In fact, the sweep lasted only about a minute. A cursory sweep of an area which a reasonably prudent officer believes to be harboring a suspect must last no longer than is reasonably necessary to dispel suspicion of danger.

During a protective sweep, items seen that are, based upon an officer’s background and experience, immediately apparent as evidence of a crime may be lawfully seized.

In *U.S. v. Flores*¹², a warrant was issued for Defendant’s arrest. Officers found Defendant at home in his kitchen, standing approximately two feet away from his refrigerator. After handcuffing Defendant, officers found a loaded firearm on top of the refrigerator. While conducting a protective sweep of the house for other individuals who might pose a danger, officers noticed a loaded shotgun on the headboard of Defendant’s bed. They entered the bedroom to secure the gun. As officers secured the shotgun, they noticed **a plastic bag containing a substance appearing to be methamphetamine in a small glass-doored compartment in the headboard**. Officers obtained a warrant to search the headboard compartment. Subsequent laboratory tests showed that the substance found in the headboard compartment was methamphetamine.

Citing *Buie*, the Court stated, “It is well established that officers conducting an arrest of an individual in a dwelling may conduct a warrantless protective search of that dwelling when they have a reasonable suspicion that ‘the house is harboring a person posing a danger to those on the arrest scene.’” The protective sweep “may extend only to a cursory inspection of those spaces where a person may be found.” When police officers conducting a proper protective sweep of a dwelling come across evidence of criminal activity in plain view, they may seize it, so long as a reasonable police officer would conclude, based on experience and the circumstances, that the item is probably incriminating.

The Court of Appeals sustained the District Court’s finding of fact that the glass door was transparent, giving the officers plain view of the bag of methamphetamine. They legally could have seized it at that point, even without the added precaution of a search warrant. The drugs found within the glass-doored compartment were admissible.

In *U.S. v. Smith*¹³, a felony arrest warrant and two misdemeanor arrest warrants were outstanding for Defendant. In addition, the police officers had information that Defendant was involved in running a methamphetamine operation. On the north side of Defendant’s house was a

¹² *U.S. v. Flores*, 149 F.3d 1272 (10th Cir. 1998)

¹³ *U.S. v. Smith*, 131 F.3d 1392 (10th Cir 1997)

detached two-car garage. During a drive-by, the officers saw Defendant standing at the open door of the detached garage.

As the officers approached the house to serve the warrant, they split into two groups to cover both the house and garage. An officer led one group to the garage to locate Defendant and to conduct a protective sweep. He began to circle the outside of the garage. On the south side he saw a door with six to eight glass panes painted black. One of the panes was missing and the area was covered with cardboard. The officer pushed aside the cardboard, announced his presence, and asked if anyone was there. He looked through the opening and saw no one, but did see **glassware, chemical containers, tubing, and other equipment which he believed to be an illegal methamphetamine laboratory.** The officer did not enter, but continued around the garage. His entire sweep lasted approximately thirty to forty seconds. Meanwhile, the other group arrested Defendant in the house. The officer who conducted the protective sweep obtained a search warrant based on what he saw in the garage.

The Court justified the protective sweep under *Buie*. The factors giving the officer a reasonable belief that the area harbored an individual posing a danger to the officer or others included (1) that Defendant was operating a methamphetamine operation at the premises, (2) that others were living at the premises and assisting him, (3) that he had violated probation and was wanted on three arrest warrants, and (4) that he had been seen at the garage a short time before. The officer could rationally infer from these facts that Defendant had accomplices in either the house or garage, and that they might use firearms to protect their drug business. The sweep was properly limited in scope, because the officer did not enter the garage when it appeared no one was in it. And its duration was between thirty and forty seconds, well within the time it took to arrest Defendant and depart. The officer's actions were also justified as an attempt to locate Defendant, who had been seen standing at the door of the garage approximately fifteen minutes earlier. At the time the officer began his sweep Defendant had not yet been located; the officer was not aware Defendant had been found and arrested until he had completed his sweep.

Weapon Plain View Seizures

In *U.S. v. Bervaldi*¹⁴, officers, armed with an arrest warrant for Deridder, went to the residence believed to be his. An officer knocked hard on the door for about 10 minutes without response. As the officers were turning to leave, the door was opened about one foot by a man whose left hand was behind his back. When the officers announced they were police, the man slammed the door shut. The officers kicked the door open, entered the house, and caught the man within ten to twenty feet of the entrance. The officers now realized that this man was not Deridder. **A cocked, but unloaded 9 millimeter pistol** was found resting on a gym bag ten feet to the right of the door. The officers conducted a protective sweep of the house believing that Deridder or others might be in the house. During this sweep, the officers noticed a very strong smell of marijuana coming from the kitchen.

Based on this information a search warrant was obtained. The resultant search yielded substantial quantities of contraband drugs, weapons and currency. The Court found the protective sweep to be lawful, concluding "...that a reasonably prudent officer could believe, based on the

¹⁴ *U.S. v. Bervaldi*, 226 F.3d 1256 (11th Cir. 2000)

cocked 9 millimeter pistol observed and the reasonable belief that Deridder was in the dwelling, that the house harbored an individual posing a danger sufficient to permit a sweep of its entirety.”

In *U.S. v. Clayton*¹⁵, officers with an arrest warrant entered the building, saw the Defendant and another person present, and arrested Defendant.

One officer walked over to the southeast corner of the building. There, he observed an icebox in the corner and then observed a black gun case beside of the icebox. The officer **opened the gun case, which contained two firearms**. A search warrant was then obtained to search the building for weapons based on the observation of the gun case and firearms. The subsequent search yielded evidence of other crimes.

Applying the “protective sweep” principles set forth in *Buie*, the Court concluded that the limited search of the building did not violate the Fourth Amendment. Testimony indicated that firearms had been involved in earlier police interactions with Defendant and that the Defendant had made threats to officers on other occasions. An officer had heard noises, which sounded like someone moving, coming from the southeast corner of the building. He testified that he was concerned something of danger to the officers could be in that corner and that other individuals could have been hiding behind the icebox. These facts and the inferences drawn therefrom are sufficient to establish that the officers had a reasonable belief that, even though Defendant was under arrest and in the hallway, someone posing a danger to them might be in the corner of the building.

In *U.S. v. Franklin*,¹⁶ an FBI agent investigating bomb threats made to the Social Security Administration helped state authorities execute a state-issued arrest warrant for the Defendant. During a protective sweep, which lasted less than two minutes, the FBI Agent found and seized a **.22 caliber rifle hanging on the wall over Defendant’s bed**. The Court held that the protective sweep was constitutional. Therefore, the rifle was in plain view and was lawfully seized.

The Court cited several facts and the inferences drawn therefrom as sufficient to establish that the officers had a reasonable belief that someone posing a danger to them might be in the residence. When state authorities and the FBI Agent went to Defendant’s residence, they knew that Defendant had recently been treated for a gunshot wound to the leg. The gunshot wound demonstrates that Defendant had recently been in the company of a dangerous, armed individual. Defendant filed no charges based on the wound. Therefore, the officers could infer that he knew his attacker and that the individual could be on the premises. They also knew that two of Defendant’s associates had been involved in illegal drug activity in which Defendant may have also been involved. One of those associates had an outstanding arrest warrant. The FBI Agent also knew that at least one other individual besides Defendant had been involved with the telephonic bomb threats. Therefore, concern that an accomplice might have been on the premises was reasonable.

¹⁵ *U.S. v Clayton*, 1999 U.S. App. LEXIS 30759 (10th Cir.)

¹⁶ *U.S. v. Franklin*, 1999 U.S. App. LEXIS 7801 (10th Cir.)

Conclusion to Part 1

As these cases demonstrate, *Buie* provides a new tool for law enforcement, i.e., protective sweeps. Law enforcement officers may now conduct a quick and limited search of the premises incident to arrest when there are articulable facts and inferences which would warrant a reasonably prudent officer in believing that there may be others present who could pose a danger to them. Evidence seized in plain view is admissible and can also support probable cause for a search warrant.

PROTECTIVE SWEEPS and ARREST SEARCHES

The Legacy of *Maryland v. Buie*¹

PART 2

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As Part 1 of this series of articles demonstrated, *Buie* provides new tools for law enforcement, i.e. protective sweeps and searches incident to arrest. Part 2 reviews cases which did not comply with the *Buie* requirements.

The *Buie* case held that before police officers may conduct a protective sweep, they must have reasonable suspicion that the area to be swept harbors a person presenting a danger to them. Protective sweeps are analogized to the “on the street ‘frisk’ for weapons”² and the “‘frisk’ of an automobile for weapons”³ and as such, the “reasonable suspicion” standard is applicable. If reasonable suspicion is not present, the protective sweep violates the 4th Amendment.

CASE EXAMPLES INVOLVING PROTECTIVE SWEEPS NOT COMPLYING WITH *BUIE*

A warrantless entry into a warehouse could not be justified when there was a lack of specific and articulable facts of the presence of another individual who posed a danger to the officers.

In *U.S. v. Chaves*⁴, agents of the Drug Enforcement Administration (“DEA”) received information from a confidential informant relating to drug trafficking in Miami, Florida. Based on the information provided, the DEA developed a plan to seize approximately 240 kilograms of cocaine using the informant’s van. The informant was to provide the keys to the van to a third person, who would then pick up the drugs and return with the van. DEA agents saw Frank Chaves drive off in the informant’s van. Using both car and helicopter, the DEA surveilled the van. Chaves stopped at a warehouse and departed a short time thereafter. Chaves then drove the van to a restaurant and entered. While Chaves was in the restaurant, a DEA agent approached the van and saw several boxes in an area that was previously empty. DEA agents then proceeded to arrest Chaves and search the van, seizing ten boxes containing 240 kilograms of cocaine, some money, and keys belonging to Chaves.

Shortly after arresting Chaves, DEA agents, who were still surveiling the warehouse, arrested Rafael Garcia and John Torres as they exited the warehouse. Both men were carrying firearms at the time of their arrest. The door of the warehouse was locked and none of the keys taken from Garcia and Torres could open the warehouse. The agents at the warehouse then waited approximately forty-five minutes outside the warehouse with Garcia and Torres in

¹ *Maryland v. Buie*, 494 U.S. 325 (1990)

² *Terry v. Ohio*, 391 U.S. 1 (1968)

³ *Michigan v. Long*, 463 U.S. 1032 (1983)

⁴ *U.S. v. Chaves*, 169 F.3d 687 (11th Cir. 1999)

custody. At this time, the agents at the warehouse, who had been joined by those arresting Chaves, conducted a warrantless entry of the warehouse. During the sweep of the warehouse, which lasted approximately five to ten minutes, the agents saw boxes similar to those found in the van.

At this point, agents drafted a search warrant affidavit, relying on information obtained both before and as a result of the warrantless entry. Late that same evening, agents obtained and executed the search warrant for the warehouse. As a result of the execution of the warrant, DEA agents found approximately 400 kilograms of cocaine, as well as packaging material, boxes, gloves and items belonging to Chaves.

On appeal, both Chaves and Garcia argued that the search of the van and the warrantless entry at the warehouse violated their Fourth Amendment rights and, therefore, their motions to suppress the cocaine seized from the van and at the warehouse should have been granted.

The court sustained the search of the van as to both Chaves and Garcia. Chaves, on the other hand, did have a reasonable expectation of privacy in the warehouse.

The court held that the initial warrantless entry of the warehouse under the auspices of conducting a “protective sweep” violated the Fourth Amendment. *Buie* held that a properly limited protective sweep, conducted incident to an arrest, is permitted under the Fourth Amendment only “when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.”⁵ The Court in *Buie* permitted police officers to undertake protective sweeps in these instances because of the compelling “interest of the officers in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack.”⁶

Here, the government’s own action undermines any claim that the entry had a protective purpose. It is undisputed that the sweep in this case did not immediately follow the arrest of Garcia and Torres outside the locked warehouse, but occurred a substantial time afterward. During the interim period, approximately forty-five minutes, the officers simply sat in their cars outside the warehouse. The agents, thus, saw no immediate need to enter the warehouse to protect themselves or other persons in the area. *Buie* requires officers to have “a reasonable basis for believing that their search will reduce the danger of harm to themselves or of violent interference with their mission.”

Moreover, the government has failed to point to any “specific and articulable” facts that would lead a reasonably prudent officer to believe that, at the time of the sweep, a sweep was necessary for protective purposes. Much of the government’s argument as to why a sweep was needed for protective purposes is not based on any specific facts in the government’s possession, but rather is based on the lack of information in the government’s possession. The testimony at the suppression hearing indicated that the officers had no information regarding the inside of the warehouse. Not knowing that there is not another individual who poses a danger to the officers

⁵*Buie* at 337

⁶*Buie* at 333

or others cannot justify a protective sweep.

The fact that Garcia and Torres were arrested with weapons in their possession “implies nothing regarding the possible presence of anyone being in [the warehouse] - the touchstone of the protective sweep analysis.”

Note, however, that the court found the search warrant to be valid, stating that “even discounting that portion of the affidavit describing information uncovered during the unconstitutional warrantless entry, the balance of the affidavit supports a finding of probable cause.”

A protective sweep may last no longer than it takes to complete the arrest and depart the premises. Where there is no arrest, and no facts demonstrate that a reasonably prudent officer would have believed that the apartment harbored another individual posing a danger to those on the scene, there can be no protective sweep under *Buie*.

In *U.S. v. Reid*⁷, while searching for a suspect, U.S. Marshals learned that a man named Mikey, one of the suspect’s close associates, lived in an apartment in San Diego, California. Federal agents went to the apartment to speak with Mikey. The agents did not have a search warrant or an arrest warrant. Deputy Marshal Kitts knocked on the door, which was answered by Junior Grant. Kitts knew that Grant was not Mikey. Kitts asked Grant if he knew who owned the Lexus in the parking space for the apartment. Grant said he did not know. Kitts could smell burning marijuana through the open door. When Kitts identified himself as a federal agent, Grant closed the door and was observed by other agents running from the back door of the apartment.

Two agents detained Grant and frisked him. Kitts handcuffed Grant and told him that he was not under arrest. Kitts did not hear any sounds suggesting that other individuals were in the apartment.

The officers entered the apartment and observed items they believed to be associated with drug trafficking. While a search warrant was being prepared, appellant Wayne Blake attempted to enter the apartment. When questioned, he gave one of the agents his wallet. The agent found a false identification in the wallet and arrested Blake. An hour later, appellant Lawrence Reid entered the apartment and encountered the officers inside. Reid fled and was apprehended. He also presented a false identification and was arrested.

The search warrant was executed a few hours later. Officers found weapons, another false identification with Reid’s picture on it, packing and shipping materials, a scale, marijuana residue and large amounts of cash in the apartment.

Blake and Reid appealed their convictions, arguing that the warrantless search of the apartment violated the Fourth Amendment. The government argued that the search was permissible either as a protective sweep or because of exigent circumstances.

⁷ *U.S. v. Reid*, 226 F.3d 1020 (9th Cir. 2000)

The court held that the warrantless search was neither a protective sweep nor justified by exigent circumstances.

Citing *Buie*, the court noted that “[a] protective sweep may last ‘no longer than it takes to complete the arrest and depart the premises’”. In the present case, Deputy Kitts testified that when the officers detained Grant in the back of the apartment, Grant was not under arrest. Additionally, the government did not point to any facts that demonstrated that a reasonably prudent officer would have believed that the apartment “harbor[ed] an individual posing a danger to those on the arrest scene.” The officers did not have any information that Grant or anyone possibly inside the apartment was violent. The officers did not see any guns and Grant cooperated with the officers when he was detained outside. Therefore, the officers were not entitled to conduct a protective sweep under *Buie*.

As to exigent circumstances, the smell of burning marijuana cannot satisfy the burden that the government must overcome because one person can smoke marijuana alone. Since that person was detained, there was no risk that he could destroy evidence. Similarly, the fact that the Lexus was parked in the parking space for apartment 101, standing alone, is insufficient to establish exigent circumstances. Other than the two facts offered by the government, there was no evidence that other persons were inside the apartment. Deputy Kitts testified that he did not hear anything that indicated that another person was inside the apartment. And when Grant was detained at the back of the apartment he told the officers that there was no one else inside.

Arrest outside the residence, sweep inside the residence requires reasonable suspicion.

In *U.S. v. Calhoun*⁸, the court dealt with an arrest outside an apartment with a subsequent protective sweep inside the apartment.

The police intercepted a kilogram of cocaine when a United Parcel Service (“UPS”) employee opened a package addressed to “Sean Johnson.” The police arranged for the controlled delivery of the package to Sean Johnson at the address indicated on the shipping label. When the delivery was made, Kendra Calhoun opened the door, identified herself as Sean Johnson, signed for the package, and took possession of it. She was immediately arrested and placed in handcuffs. By pre-arranged plan, other officers entered the apartment and conducted a “sweep.” They had no prior knowledge anyone was inside. They found two men and an infant. The officers had neither an arrest nor a search warrant.

After having received her *Miranda* rights, Calhoun was given a consent form to sign so the police could search her apartment. She signed it. Asked whether any weapons were in the apartment, Calhoun told the officers a shotgun was under the bed. The officers retrieved the gun. They also seized various documents, including cash receipts for many items of value in the apartment and UPS forms.

Calhoun’s motion to suppress the weapon, the statements she made to police, and various documents found in the apartment was denied. She claims this was error because the

⁸ *U.S. v. Calhoun*, 49 F.3d 231 (6th Cir. 1995)

pre-arranged sweep was unconstitutional under *Buie*. Although the sweep did not lead to the discovery of any evidence, she contends it was instrumental in causing her to consent to the search and to make the statements she sought to suppress.

The court agreed with Calhoun that the sweep of her apartment was illegal. However, the evidence seized did not turn on the unauthorized sweep. The district court's finding that Calhoun's consent was voluntary is not clearly erroneous. Her consent made the subsequent warrantless search of her apartment lawful.

A protective sweep under *Buie* is defined as "a quick and limited search of premises It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." It does not include a search of a box of business records.

The case of *U.S. v. Noushfar*⁹ involves a conspiracy to smuggle valuable Persian rugs into the United States in violation of an Executive Order.

Kamran Shayesteh and his wife Zohreh owned and managed the Galleria deFarsh, a large rug store in Burlingame, California. In 1987, a presidential order imposed an embargo on virtually all Iranian goods. The embargo prevented importation of Iranian products, but did not prevent ownership. The restriction created a sudden increase in demand and in price for the limited supply of Persian (Iranian) rugs already in the United States.

The Shayestehs conspired with others to smuggle Persian rugs from Canada, where they could be legally imported, to California. The conspiracy worked more or less as follows: The Shayestehs, with the assistance of Rabie, imported Iranian rugs from Tehran to Vancouver, often via Singapore, Hong Kong or Malaysia. The rugs were then smuggled into the United States by drivers who failed to declare the rugs or else lied about their origin.

During three smuggling operations, the defendants were assisted by Tim Meyer, an undercover United States Customs agent, whom the Shayestehs hired to drive a truck filled with contraband rugs over the border. When the rugs entered Washington state, customs officials documented them and marked them with an invisible thread. The rugs were delivered to Noushfar in Seattle, and he sent them to the Galleria in California.

The investigation eventually led to the arrest of the Shayestehs by customs agents who then undertook a sweep of their apartment. Agents testified that they arrested the Shayestehs within a minute of entering the apartment. Instead of leaving promptly, they made the Shayestehs sit in their living room while the agents went through the apartment for more than a half-hour. During this period, they spotted a box with business receipts in a closet. Thereafter, other agents returned to the closet to examine the box further. There was no suggestion that the agents feared for their safety. Even if the box had been in "plain view," the further examination exceeded the narrow purpose of a *Buie* sweep.

⁹ *U.S. v. Noushfar*, 78 F.3d 1442 (9th Cir. 1996)

The court held that the “sweep” by the seven customs agents exceeded the limits of a *Buie* sweep in both time and scope.

Conclusion

As these cases illustrate, a protective sweep of a premises is a search under the 4th Amendment that is analogous to a “*Terry* frisk” in that it requires reasonable suspicion to believe that the premises harbors a person who is a danger to those on the arrest site. The scope of the protective sweep is limited to a cursory inspection of those places in which a person might be hiding.

PROTECTIVE SWEEPS and ARREST SEARCHES

The Legacy of Maryland v. Buie

Part 3

Dean Hawkins
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As Part 1 of this series demonstrated, *Maryland v. Buie*¹ provides new tools for law enforcement - protective sweeps and searches incident to arrest. Part 2 reviewed cases that did not comply with the *Buie* protective sweeps requirements. Part 3, the concluding part of this series, reviews the *search incident to arrest* aspect of *Buie*.

In dealing with the issue of the scope of protective sweep, the Court in *Buie* stated that:

... as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. This is no more and no less than was required in *Terry*² and *Long*³, and as in those cases, we think this balance is the proper one.

These words give rise to “two prongs” of *Buie* – search incident to arrest and protective sweeps.

“Search incident to arrest” is predicated solely on the arrest and does not require probable cause or reasonable suspicion. It is the subject of this article.

CASE EXAMPLES OF THE “SEARCH INCIDENT TO ARREST” PRONG OF *BUIE*

A Valid Search Incident to Arrest That Went Too Far

In *United States v. Ford*⁴, on the morning of January 10, 1992, six law enforcement officers, including a special agent of the FBI, arrived at the home of Mark Ford’s mother with an arrest warrant for Ford. Upon entering the apartment, the FBI agent observed appellant in the apartment hallway and arrested him. The agent then conducted what the Government characterized as a “protective sweep.” He walked into the bedroom immediately adjoining the hallway in which appellant was arrested, purportedly to check for individuals who might pose a danger to those on the arrest scene. Once in the bedroom, the agent spotted a loaded gun clip in plain view on the floor. Although he realized that there were no people in the bedroom, the agent nevertheless continued to search. He lifted a mattress under

¹ *Maryland v. Buie*, 494 U.S. 325 (1990)

² *Terry v. Ohio*, 392 U.S. 1 (1968)

³ *Michigan v. Long*, 463 U.S. 1032 (1983)

⁴ *United States v. Ford*, 312 U.S. App. D.C. 301; 56 F.3d 265 (D.C. Cir. 1995)

which he found live ammunition, money, and crack cocaine, and he lifted the window shades and found a gun on the windowsill.

The protective sweep permitted under *Buie* is limited. In this case, the court held that the agent was justified in looking in the bedroom, which was a space immediately adjoining the place of arrest. And once in the bedroom, the agent could legitimately seize the gun clip that was in plain view. The agent could not, however, lawfully search under the mattress or behind the window shades because these were not spaces from which an attack could be immediately launched. There were no exigent circumstances justifying this further warrantless search. The court held that the items taken from under the mattress and from behind the window shades were seized in violation of the Fourth Amendment and, therefore, inadmissible at trial.

In its decision, the court reasoned that once in the bedroom pursuant to a legitimate protective sweep under *Buie*, and having seen the gun clip in plain view, the law enforcement officers had reasonably available measures to ensure their safety. They could have secured the bedroom and telephoned a magistrate for a search warrant. They could have asked the owner of the apartment, appellant's mother, for consent to a search of the apartment. These reasonable alternatives to a warrantless search would have avoided the infringement of Fourth Amendment rights, without jeopardizing the safety of the officers. Because the officers took no such measures, the search was unreasonable and hence unconstitutional.

(Note: The court commented that the Government chose not to pursue *Buie*'s "protective sweep" prong at oral argument. This made sense, the court stated, because record is clear that the Agent possessed no articulable facts which would have led him to believe that the area he searched harbored an individual posing a danger to those on the arrest scene.)

A Search Between the Mattress and Box Springs, Revisited

The case of *U.S. v. Blue*⁵ involved the November 22, 1994, search of the interior of a bed in Blue's apartment incident to the arrest of another man, Elton Ogarro. On that date, approximately a dozen agents and officers of the DEA's Task Force went to 64 East 131st Street in Manhattan to execute two arrest warrants and a search warrant for an apartment on the second floor. The arrest warrants were for Brown and Ogarro, who were believed to have been selling crack cocaine.

Shortly after the agents arrived in the vicinity, they arrested Brown outside the building. They waited a few minutes to see if Ogarro would also exit the building. When he did not, the agents entered the building and walked up the stairs. Moments later, the agents saw Ogarro running down the hallway. Agent Fernandez grabbed Ogarro at the top of the stairs and attempted to push him up against the wall. The wall, however, turned out to be the door to Blue's apartment, which flew open, causing Ogarro to fall to the ground inside the apartment.

Agents Fernandez, Koval and Jenkins entered Blue's apartment. Jenkins identified Ogarro as the man for whom they had a warrant, handcuffed him behind his back, and placed him on the floor face down. Jenkins then approached Blue, who had been sitting on the bed during the incident. Jenkins

⁵ *U.S. v. Blue*, 78 F.3d 56 (2nd Cir. 1995)

identified himself as a police officer, but received no response from Blue, who appeared lethargic, as though under the influence of a narcotic. Jenkins handcuffed Blue behind his back and placed him in a prone position on the floor.

After Ogarro and Blue were handcuffed, Agents Jenkins and Koval performed a “security sweep” of the apartment. The apartment consisted of a single room, approximately 12 feet by 8 feet, all of which was visible at a glance. Agent Koval lifted Blue’s mattress off its box spring. In the middle of the box spring, Koval discovered a package wrapped in brown paper, a machine gun, and an ammunition clip.

Blue was arrested and charged with unlawful possession of a firearm.

In his appeal, Blue does not contest that the officers (1) had the requisite articulable facts that he posed a danger and (2) properly detained him. He does, however, claim that the search between his mattress and box spring during his detention exceeded the permissible scope of a protective sweep. In its opinion, the court considered separately the issues of whether the search was legally justified because (1) the bed was within the immediate reach of Ogarro, and (2) the space between the mattress and box spring may have concealed a person.

The court held that the search of the area in the middle of the box spring was beyond the reach of Ogarro and thus was overbroad. Ogarro and Blue were prone on the floor, two feet from the bed, their hands cuffed behind their backs, and guarded by Agent Fernandez who stood over them. Ogarro’s and Blue’s manacled hands were clearly visible to Agent Fernandez at all times. Given the small size of the one-room apartment and the fact that Ogarro and Blue were secured during the entire time, there was no possibility that either one of them could reach deep into the interior of the bed without being stopped by Agent Fernandez or one of the other agents.

As to the contention that the search of the interior of the bed was justified as a protective sweep for a possible third person, the court held that the officers lacked articulable facts to support an inference that a person could have been hiding in a cavity in the box spring. There was no indication in the record of any movement by Blue or any other unidentified individuals when the agents entered the room. Moreover, there was no indication that the officer’s search was the result of a rise or bulge in the mattress. Nor did the officers suggest anything unusual about the bed. Furthermore, prior to their unanticipated entry, the arresting officers had no information concerning Blue or his apartment which would indicate that their safety was threatened by a hidden confederate, let alone one within the confines of the mattress and box spring.

Search of Two Adjoining Rooms Incident to Arrest

In the case of *In Re: Sealed Case*⁶, the court held the warrantless entry into a residence and the warrantless arrest of the defendant were lawful. The court concluded that Metropolitan Police Department officers Riddle and Wilber had probable cause to believe the defendant was committing a burglary. They observed someone appear to break open the door to an unlit house and enter it without turning on the lights. When they approached the door to investigate, they discovered that the lock was

⁶ *In Re: Sealed Case*, 332 U.S. App. D.C. 84; 153 F.3d 759 (D.C. Cir. 1998)

indeed broken. When Riddle identified himself as a police officer, the person who had entered the house did not respond in any way. When Riddle again identified himself as a police officer and tested the door, the person inside pushed back for several seconds. Riddle then heard steps going away from the door. The totality of these circumstances gave Riddle probable cause to believe a burglary was in progress.

Riddle entered the house and chased the defendant up the stairs and into a large, darkened bedroom. He seized the defendant, led him into the hallway, patted him down for weapons, took him downstairs to the first floor, and handed him off to other officers. Riddle immediately returned upstairs to the large bedroom. In the darkened corner where the defendant had been standing, Riddle discovered a bag of crack cocaine and a semiautomatic handgun. Riddle entered the small bedroom, which was only a few feet from the large bedroom, a few feet from the top of the stairs, and adjacent to the room in which the defendant had been apprehended. He saw and seized a clear plastic bag containing white rocks and a triple-beam scale. The defendant moved to suppress these items.

The court upheld the search of the large bedroom as a search incident to arrest. The guns and drugs Officer Riddle found in the large bedroom were located in an area under the defendant's "immediate control." The defendant was arrested while standing next to a chair in the bedroom. The drugs were found on that chair, and the gun was found beside it.

In upholding the search of the small bedroom, the court relied on *Buie*. The court held that the small bedroom was an area immediately adjoining the place of arrest from which an attack could have been immediately launched. Officer Riddle discovered the drugs and the triple-beam scale "in plain view" during a "cursory visual inspection" of the small bedroom. The court held that the search of the small bedroom was lawful under the "search incident to arrest" prong of *Buie*.

Search of Attic Space Above Place of Arrest

In *Ortiz-Sandoval v. Gomez*⁷, police had probable cause to arrest the defendant for a homicide. The police went to the house where the defendant was living and learned that he was living in an attached garage that had been converted to an apartment. The police entered the apartment and found Ortiz-Sandoval and his brother asleep. They arrested Ortiz-Sandoval. Officer McLaren testified that after Ortiz-Sandoval and his brother were secured he immediately looked around the garage apartment. A ceiling opening large enough for the officer to fit his upper torso inside was "just above" where Ortiz-Sandoval slept. The opening adjoined the area of the arrest and was an area from which an attack could be immediately launched.

In his appeal, the defendant argued that the protective sweep was not reasonable under *Buie* because the police lacked reasonable suspicion to believe other persons were present. This court stated that that information was not necessary "because the officers were entitled, even without reasonable suspicion, to search areas adjoining the place of arrest" from which an attack could be immediately launched.

⁷ *Ortiz-Sandoval v. Gomez*, 1996 U.S. App. Lexis 7999 (9th Cir. 1996)

ARREST OUTSIDE PREMISES, PROTECTIVE SWEEP INSIDE PREMISES REQUIRES REASONABLE SUSPICION OF DANGER

Cases permitting entry into a premise following an arrest outside have all involved the “protective sweep” prong of *Buie*, requiring reasonable suspicion of danger. No courts have allowed a *Buie* “search incident to arrest” inside the premises following an arrest outside the premises.

The case of *Sharrar v. Felsing*⁸ involved suit under 42 U.S.C. §1983 for arrests without probable cause, unreasonable search and seizure, and use of excessive force.

This case began with Patricia Gannon’s 911 call alleging that her estranged husband, David Brigden, and three other unidentified people had come into her apartment and had beaten her up. Officer Felsing was dispatched to Brigden’s apartment. The situation quickly escalated to the point where additional officers (including some from adjoining communities), the SWAT team (dressed in black fatigue uniforms and armed with shotguns, rifles and submachine guns), officers with drug/explosive sniffing dogs, the town Mayor, the Police Commissioner, and an FBI trained hostage negotiator became involved.

The police created an inner and outer perimeter around Brigden’s residence. All residents in the inner perimeter were evacuated. Someone was dispatched to contact the schools in the area to divert their normal bus routes and to keep all children who lived in the immediate vicinity of Brigden’s residence at school. The fire station was ordered to accept evacuees; fire trucks and ambulances were told to come to the scene without lights and sirens; the City marina was closed so that no boats could leave the harbor; and the bridge which provided the sole vehicular access to the City was blocked. Once the inner perimeter was cleared, an officer, who was “the department sniper,” and another officer were stationed at a nearby building. At least four officers were assigned to the rear of the residence.

Brigden and the other men in the residence complied with orders to come out of the apartment at which time they were taken into custody. The “tactical unit immediately entered the building and cleared it to make sure there were no other suspects still hiding inside.” Brigden’s residence consisted of a three story, single-family house that had been converted into four separate locked and numbered apartment units. The first floor contained two apartments, one of which was occupied by Brigden. There were separate apartments on the second and third floors. The officers admitted that they knew that the other units were rented to other people. The SWAT team cleared the building by entering each room in the entire building to make sure there were no other suspects. Police then secured the residence so that no one would enter the premises again until a search warrant was procured. This “sweep” took somewhere between five and twenty minutes.

There were a number of issues in the case including the lawfulness of the arrests, the use of force, qualified immunity, and “protective sweep.”

The officers sought to justify their warrantless entry into Brigden’s unit immediately following the arrest on the ground that it was a quick protective sweep incident to the arrest and needed to protect the safety of the officers involved. The officers contended they entered the residence seeking to

⁸ *Sharrar v. Felsing*, 128 F.3d 810 (3rd Cir. 1997)

determine that there were no other accomplices hiding in the building with access to the gun that remained unaccounted for.

This court held that a sweep incident to an arrest occurring just outside the home must be analyzed under the “protective sweep” prong, not the “search incident to arrest” prong, of *Buie*. This analysis requires “articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” The court cited cases from the 6th, D.C., 11th, 2nd and 10th Circuits in support of this position.

The court found no articulable basis for the sweep and concluded that the *Buie* standard was not met. However, this court also held that because the law as to protective sweeps inside the home incident to arrests made outside the home was not clearly established, defendants were protected by qualified immunity.

Conclusion

The Supreme Court has approved protective sweeps of closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that there must be articulable facts which would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest site. The initial sweep should last no longer than necessary for the officers to arrest the subject and leave the premises. Any person found during the sweep may be frisked under the familiar *Terry* reasonable suspicion test. Any evidence or contraband found during the sweep may be seized under the plain view doctrine.

LOCKED CONTAINERS - AN OVERVIEW

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Law enforcement students often ask the question “can I search a locked container?” A better question to ask may be “when can I search a locked container?” The fact that a container is locked may not increase the possessor-owner’s expectation of privacy but does limit the law enforcement officer’s access to the secured area. The ability to search a locked container will depend on the justification the law enforcement officer has for intruding into the area. The purpose of this article is to examine the different legal avenues a law enforcement officer can use to search locked containers.

WITH A WARRANT

The Supreme Court has expressed a strong preference that law enforcement officers obtain a search warrant before conducting a search of any kind. Searching a locked container is no different.¹ The confusion that surrounds the decision to search a locked container begins when the officer is considering a warrantless search of that container.

The Supreme Court has authorized warrantless searches in several circumstances. Automobile searches, searching those lawfully arrested, *Terry* frisks, inventories and consensual searches are some areas the Supreme Court has permitted government intrusion without a warrant. Under what circumstances may a law enforcement officer intrude into a locked container without prior judicial approval? Let us examine these warrant exceptions one at a time.

THE FRISK

In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), the Supreme Court justified the frisk. A frisk allows the law enforcement officer to pat the outer clothing of persons that the officer has reason to suspect are armed and dangerous. The justification for the frisk is to allow the officer to take “steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.” In a subsequent decision, the Supreme Court expanded the frisk to include those areas within the immediate control of the suspect. *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469 (1983).

While a law enforcement officer may frisk persons and the areas under their control pursuant to the *Terry* and *Long* decisions, this does not mean the officer can intrude into a locked container encountered during a frisk. The purpose of the frisk is to allow the officer to act if he has a reasonable “belief that his safety or that of others was in danger,” *Terry*, see *id.*, at 27. In neutralizing the threat of physical harm the officer must also consider the privacy protections afforded the suspect. If the officer can preserve safety without intruding into a locked container, the law will insist on that alternative.

¹ *U.S. v. Chadwick*, 433 U.S. 1 (1977)

The government cannot successfully argue that a law enforcement officer must intrude into a locked container to prevent the immediate retrieval of a weapon. The time required by the suspect to unlock the container and retrieve a weapon would allow the officer adequate time to preserve his safety through other means. The purpose of a frisk is to secure weapons that might become used by the suspect during a face-to-face encounter. Courts have been reluctant to extend this intrusion, based on something less than probable cause, to find items that the suspect may only get to through great difficulty. During a *Terry* stop, law enforcement officers are entitled to take measures designed to preserve their safety that does not require unnecessary intrusions. For instance, if the suspect is holding a locked container, the law enforcement officer would be justified in separating the suspect from the container. The action preserves the officer's safety yet requires no intrusion. If the suspect is standing near a locked container, such as the trunk of an automobile, the officer can reposition the suspect. Of course, the officer may always ask for the person's consent to open the container. When conducting a *Terry* frisk, the officer should look for alternative ways to protect him or herself against the contents of a locked container but he or she may not force open the container.

SEARCH INCIDENT TO ARREST

The Supreme Court has long held that searching the persons of those that law enforcement officers have arrested is reasonable. This search also includes the areas under their immediate control and is designed to secure weapons, means of escape and evidence. *Chimel v. California*, 395 U.S. 752 (1969). The scope of the search is limited to those areas in which the arrestee might gain possession of such items. Does this allow the officer to search the arrestee's locked container, such as a briefcase? While the Supreme Court has never directly held that such a search is reasonable, several circuit courts have interpreted Supreme Court cases to reach this conclusion.

In *New York v. Belton*, 453 U.S. 454 (1981), the Supreme Court set out the parameters for a lawful search of an automobile incident to arrest in which the arrested person was found. The Court held that the interior of the automobile, including containers found therein, are within the immediate control of the arrestee. Its definition of a container "includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like."

Several courts have interpreted this definition to include locked containers, such as luggage and glove boxes. In *U.S. v. Tavalacci*, 895 F.2d 1423 (D.C. Cir. 1990) the court applied the *Belton* rule in permitting an officer to open a locked bag that was in the immediate control of the arrestee. The court in *U.S. v. Gonzales*, 71 F.3d 819 (11th Cir. 1996), stated that the *Belton* rule allowed searches incident to arrest to include glove boxes, locked or unlocked. The 8th Circuit Court of Appeals, in *U.S. v. Valiant*, 873 F.2d 205 (8th Cir. 1989) stated that "(t)he search occurred incident to that arrest. Because the locked briefcase was a closed container within that vehicle, it lawfully could be searched."

Using these cases as a basis for interpretation, the courts appear to be heading in the direction of allowing any container found in the immediate control of the arrestee to be searched.

Whether the arrestee could immediately reach the container to obtain a weapon, a means of escape, or destroy evidence, seems immaterial.

INVENTORY

The Supreme Court has recognized the need for law enforcement personnel to inventory property for which they have taken into their custody.² The three reasons for permitting inventory searches are for the protection of the owner's property while it remains in government custody, the protection of the government officials from disputes over lost or stolen property, and the protection of government officials from danger. The purpose of the inventory search must be to meet one of these concerns and cannot be a pretext to search for evidence.³ If the government officials follow standard procedures related to the three reasons permitting inventory searches, these searches are reasonable within the meaning of the Fourth Amendment.

In *Florida v. Wells*, 495 U.S. (1990), the Supreme Court considered the issue of whether a law enforcement officer may force open a locked container to inventory its contents. The Court examined the discretion permitted an officer engaged in an inventory search. It held that discretion to open "closed" containers is acceptable if such discretion is based on standards related to preserving property or avoiding unnecessary danger. If the government has designed the standardized policy to maximizing the discovery of evidence of criminal activity, the policy is flawed. The Supreme Court allows an officer sufficient latitude in determining whether a particular container should be opened. If the agency produced a policy that allowed officers the leeway to inventory "closed" containers, such an intrusion would be permissible.

It is logical to assume that if the agency produced a standardized policy regarding locked containers, the same principle would allow the officer to inventory the contents of those containers. Many courts have considered the issue of whether an officer may inventory the contents of the locked trunk of a vehicle. Without fail, if the officer is conducting the inventory pursuant to a standard agency policy to secure property or avoiding safety hazards, the inventory was permissible.⁴ In a case on point, *United States v. Como*, 53 F.3d 87 (5th Cir. 1995), the Fifth Circuit Court of Appeals considered an agency inventory policy that gave the officer the authority to inventory the contents of a locked container. In upholding the policy, the circuit court found the intent of the inventory policy was to protect property and therefore, the authority was a reasonable application of the inventory search principle.

MOBILE CONVEYANCE (CARROLL DOCTRINE)

In the monumental case of *Carroll v. United States*, 267 U.S. 132 (1925) the Supreme Court found that a warrantless search of an automobile was reasonable if it was based on probable cause. In *Carroll*, law enforcement officers ripped up the upholstery of the defendant's automobile after they developed probable cause that he was transporting bootleg alcohol. The

² *South Dakota v. Opperman*, 428 U.S. 364 (1976)

³ *Colorado v. Bertine*, 479 U.S. 367 (1987)

⁴ *United States v. Velarde*, 903 F.2d 1163 (7th Cir. 1990); *United States v. Duncan*, 763 F.2d 220 (6th Cir. 1985); *United States v. Como*, 53 F.3d 87 (5th Cir. 1995); *United States v. Martin*, 566 F.2d 1143 (10th Cir. 1977).

Supreme Court held that this search was reasonable, even without a warrant, because of the inherent mobility associated with automobiles.

Today, the automobile exception to the Fourth Amendment's warrant requirement is well known. Yet does the exception allow law enforcement officers to open locked containers found while engaged in a lawful mobile conveyance search? Based on the many cases decided since the *Carroll* decision, the answer is yes.

The *Carroll* case itself dealt with the destruction of the defendant's property. To find the evidence sought, the officers had to rip into the automobile's upholstery, which is even more intrusive than a search of a locked container. Nonetheless, the Supreme Court found the search to be reasonable within the meaning of the Fourth Amendment.

In *United States v. Ross*, 456 U.S. 798 (1982), the Supreme Court interpreted its prior holdings⁵ to mean that if the law enforcement officer had probable cause to conduct a warrantless search of a vehicle on the side of the road, the officer may also conduct an immediate and warrantless search of the contents of that vehicle. The officer would not need to secure the container and obtain a warrant. The Court also explained that if an officer is conducting a lawful *Carroll* search, he or she may conduct that search as if they had a search warrant issued by a magistrate. Obviously, a law enforcement officer could open a locked container with a search warrant if the container could hold the item sought.

The *Ross* Court said "(t)he scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found." This is also a clear indication that the Court would affirm a warrantless automobile search of a locked container found therein. Otherwise, the Supreme Court would not have drawn attention to the fact that the nature of the container itself was irrelevant to the reasonableness of the search. In sum, the *Ross* majority opinion stated "(i)f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search (emphasis added)."

In *California v. Acevedo*, 500 U.S. 565 (1991), the Supreme Court reaffirmed its opinion in *Ross* by stating that if an officer has probable cause to conduct a warrantless search of an automobile, he or she may also conduct a warrantless search of any containers found therein that may contain the item sought. In reviewing its decision in *Carroll*, the Court reasoned that if the destruction of the interior of the automobile was reasonable, then looking inside a closed container was reasonable. Logically, opening a locked container would be no more unreasonable than destroying the interior of an automobile.

CONSENT

The government has the burden of establishing the voluntariness of consent. When a law enforcement officer conducts a search pursuant to a suspect's consent, the objective standard of

⁵ The Supreme Court's primary focus was on the re-emphasis of its holding in *Chambers v. Maroney*, 399 U.S. 42 (1970).

reasonableness determines the parameters of that consent what would the consenter have understood the limits to the search were based on the exchange between the suspect and the law enforcement officer.⁶ As this question relates to a locked container, the law enforcement officer must establish that the suspect consented to a search of the locked container.

In *Florida v. Jimeno*, 500 U.S. 248 (1991) the Supreme Court held that the Fourth Amendment is satisfied when it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted a particular container to be opened. Expressed language typically defines the scope of the consent search. The Court noted that it "is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk." However, if an officer can reasonably conclude that the suspect has granted consent to search a particular container, the search is reasonable within the meaning of the Fourth Amendment.

Without a direct exchange concerning a locked container, establishing consent to enter it is not easy. For instance, in *United States v. Strickland*, 902 F.2d 937 (11th Cir. 1990), the court had to consider whether a law enforcement officer was justified in slashing the suspect's spare tire found in his trunk after obtaining a general consent to search the auto's contents. The officer stated "I want you to understand that I would like to search the entire contents of your automobile . . . if you want to sit down, that's fine with me, to get out of the cold but I want you to understand that I would like to search the entire contents of your car." The suspect responded, "That's fine." Based on this exchange, the officer ordered the spare tire slashed open and evidence was found inside. The 11th Circuit did not find this search to be within the parameters set out in what the suspect understood the scope of the search to be. The court held that it is not reasonable to conclude that a person agreed to the destruction of their property by consenting to a search of its contents.

Believing that a person gives permission to destroy their property when they grant a general consent to search their property is unreasonable. Therefore, when an officer obtains a general consent to search the suspect's property, he or she may not damage or destroy a locked container discovered through that search. Specific consent to open that container should be obtained from the suspect.

CONCLUSION

We have looked at several legal principles that may or may not allow government intrusion into locked containers. The central feature of this question is to understand why the officer is intruding into protected areas. The law enforcement officer should always remember that the courts will look upon any search conducted without a warrant with suspicion. Oftentimes, the law enforcement officer can dismiss these issues by simply obtaining a valid consent to conduct the search. When a warrant or consent is not obtainable there are few justifications for opening a locked container. These justifications are limited to containers encountered during a mobile conveyance (*Carroll*) search, an inventory search and those within

⁶ *Illinois v. Rodriguez*, 497 U.S. 177 (1990)

an arrestee's immediate control. Otherwise, it is probably best to refrain from opening the locked container.

THE KNOCK AND ANNOUNCE RULE: “KNOCK, KNOCK, KNOCKING ON THE SUSPECT’S DOOR”

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THE HISTORY

It is a time-honored principle of law that law enforcement officers must provide notice to the occupants of a premises of which a warrant is about to be served. In *Semayne’s Case*, 5 Co. Rep. 91a, 91b 77 Eng.Rep. 194, 195 (K.B.1603)(quoted in *Wilson v. Arkansas*),¹ the court states:

But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . . , for the law without a default in the owner abhors the destruction or breaking of any hous (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it.

Some historians believe this law may date back to as early as 1275, for even *Semayne’s Case* mentions that it is merely affirming common law. *Wilson*, at footnote 2.

Several reasons exist for the “knock and announce” principle. As set out in *United States v. Nolan*,² the rule “reduces the likelihood of injury to police officers, who might be mistaken, upon an unannounced intrusion into a home, for someone with no right to be there.” The rule reduces the risk of needless damage to private property. It also incorporates the respect for the individual’s right of privacy, which is a consideration even when making an entry to search or arrest.

THE RULE

How is this ancient legal standard applicable to the modern law enforcement officer? Title 18 U.S.C. § 3109 states:

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Law enforcement officers must identify themselves and announce their purpose before using force to enter a dwelling with a search warrant. In *Wilson v. Arkansas*, the Supreme Court held that the manner in which law enforcement officers enter a dwelling is subject to review by a court to decide whether the officers acted reasonably under the Fourth Amendment. If the

¹ 514 U.S. 927 (1995)

² 718 F.2d 589, 596 (3d Cir.1983)

officers mismanage the entry, even with a validly issued warrant, a reviewing court can suppress the fruit of the search.³ This is especially unsettling if, after months of investigation, the application for the warrant was written, reviewed and approved, and a judicial officer concluded that probable cause existed and issued a warrant. The difficult legal hurdles seem to have been cleared by the officer.

The “knock and announce” rule requires the officers to announce their presence and authority. The officers need not actually knock on the target dwelling’s door for compliance nor must they state any “magic words.” A reviewing court will be interested in whether the occupants have been adequately alerted to the officers’ presence and authority and been given the opportunity to comply. The use of a bullhorn or other appropriate means is acceptable.⁴

Once the officers have notified the occupants of their intentions, they must allow those inside a reasonable chance to act lawfully.⁵ The time required varies from case to case. Many courts have permitted officers to enter after waiting more than five seconds.⁶ Likewise, many courts have found entry at five seconds or less to be unreasonable.⁷ However, no such “bright line” five second rule exists.

Each case must turn on its own facts. Certain instances will require more time. For instance, officers serving a warrant in the late evening or early morning hours must take into account that they must awake the occupants, who must gather their senses, and perhaps dress themselves before responding. In other circumstances, such as when there is a barking dog, the law may require less time before the officers force entry into the dwelling.⁸

Once the occupants have rejected the officers’ request to enter the dwelling peacefully, force may be used. Refused admittance need not be an affirmative refusal. Officers can infer refusal from circumstances such as the failure of occupants to respond,⁹ the sound of evidence being destroyed,¹⁰ or of fleeing suspects.¹¹

THE EXCEPTIONS

The Federal Rules of Criminal Procedure have no provisions for prospectively authorizing “no knock” warrants. This does not mean that officers must always give clear warning before entering a dwelling with a search warrant. The *Wilson* Court stated that not every law enforcement entry into a dwelling must be preceded by “knocking and announcing.”

³ *U.S. v. Nolan*, 718 F.2d 589 (3rd Cir. 1983)

⁴ *U.S. v. Spike*, 158 F.3d 913 (6th Cir. 1998)

⁵ *U.S. v. Dice*, 200 F.3d 978 (6th Cir. 2000)

⁶ *U.S. v. Markling*, 7 F.3d 1309 (7th Cir. 1993); *U.S. v. Spriggs*, 996 F.2d 320 (D.C. Cir. 1993); *U.S. v. Ramos*, 923 F.2d 1346 (9th Cir. 1991); *U.S. v. Myers*, 106 F.3d 936 (10th Cir. 1997); *U.S. v. Knapp*, 1 F.3d 1026 (10th Cir. 1993); *U.S. v. Gatewood*, 60 F.3d 248 (6th Cir. 1995)

⁷ *U.S. v. Moore*, 91 F.3d 96 (10th Cir. 1996); *U.S. v. Lucht*, 18 F.3d 541 (8th Cir. 1994); *U.S. v. Marts*, 986 F.2d 1216 (8th Cir. 1993)

⁸ *U.S. v. Wood*, 879 F.2d 927 (D.C. Cir. 1989)

⁹ *U.S. v. Espinoza*, 105 F.Supp. 2d 1015 (E.D. Wisc. 2000)

¹⁰ *U.S. v. Sagaribay*, 982 F.2d 906 (5th Cir. 1993)

¹¹ *U.S. v. Anderson*, 39 F.3d 331 (D.C. Cir. 1994)

The Supreme Court even hinted that if officers provided facts to the issuing magistrate at the time of their application, the magistrate could consider such facts in permitting a “no knock” entry. See *Richards v. Wisconsin*, at footnote 7.¹²

Generally, there are three recognized circumstances in which officers are justified in making a “no knock” entry with a warrant. The *Wilson* Court provided two examples that excuse the “knock and announce” requirement. If officers have reason to suspect threats of violence or that the evidence sought will be destroyed, they may enter a dwelling without providing notice. However, the Court left to lower courts circumstances when it is reasonable for officers to enter a dwelling without first asking for permission. A third exception, that persons within the dwelling already know of the officers’ authority and presence, has been recognized by several circuit courts.¹³

In *Richards*, the Supreme Court revisited this issue. The *Richards* decision struck down a Wisconsin statute that allowed officers to use force to gain entry without first announcing their intentions if the search warrant was issued to locate narcotics. The Supreme Court found this blanket statute inconsistent with the Fourth Amendment. However, the Supreme Court stated that if officers have a reasonable suspicion their “knock and announce” would be dangerous, futile or inhibit the effective investigation of the crime, such notice was not required.

Officers’ fear of armed occupants has generated many cases in which the reviewing court found it reasonable to dispense with the “knock and announce” requirements. In *United States v. Ramirez*,¹⁴ the Supreme Court found it reasonable for officers to make a “no knock” entry when they had reason to believe that weapons were stockpiled in the target dwelling and they were seeking a dangerous escapee.

Courts are not inclined, however, to allow a “no knock” entry based simply on the fact that officers believe weapons are in the target dwelling. Other factors must also be present. In *United States v. Fields*,¹⁵ the court found that when occupants sounded a “5-0” alarm, combined with Fields’ known potential for violence and the nature of a narcotics bagging operation, it was reasonable for the officers to make a no-knock entry. The court held that compliance with the “knock and announce” requirement would be futile (because the occupants already knew the police were there), potentially dangerous (the defendant might arm himself), and might lead to the destruction of evidence (the defendants could easily dispose of the drugs).

THE RUSE

Many officers have used ruses or tricks to gain entry. Several courts have held that the use of a ruse does not invoke Title 18 U.S.C. § 3109 if no breaking occurs.¹⁶ For this reason,

¹² 520 U.S. 385 (1997)

¹³ *U.S. v. Bates*, 84 F.3d 790 (6th Cir. 1996)

¹⁴ 523 U.S. 65 (1998)

¹⁵ 113 F.3d 313 (2nd Cir. 1997)

¹⁶ *U.S. v. DeFeis*, 530 F.2d 14 (5th Cir. 1976); *U.S. v. Contreras-Ceballos*, 999 F.2d 432 (9th Cir. 1993); *U.S. v. Stevens*, 38 F.3d 167 (5th Cir. 1994)

officers should not employ ruses that might be discovered before entry is secured. Other courts have examined how a reasonable person would view the ruse. Ruses that would cause fear in the minds of the occupants (gas leak detected in the house) are designed to fail.¹⁷ Likewise, ruses that have the effect of convincing the occupant that he or she has no choice but to invite the undercover officer will fail. Officers should not present themselves as agents of other government agencies for the purpose of gaining access.¹⁸ The court in *United States v. Bosse* struck down consent obtained by a federal officer posing as a state license inspector.

Successful ruses are those in which the undercover officer presents a service to the unsuspecting occupant. For instance, calls through the door of offers of room service, maid service, or to deliver flowers are acceptable. The use of subterfuge in law enforcement has long been recognized as a vital tool in the investigation of crime. Ruses that do not use force, leave little option for the occupant but to comply, or have only a small chance to be discovered before access is gained are compatible with Title 18 U.S.C. § 3109 and the Fourth Amendment.

¹⁷ *People v. Jefferson*, 43 A.D.2d 112 (1973); *U.S. v. Giraldo*, 743 F.Supp. 152 (E.D.N.Y. 1990)

¹⁸ *U.S. v. Bosse*, 898 F.2d 113 (9th Cir. 1990)

ELECTRONIC PAGERS – MAY A LAW ENFORCEMENT OFFICER ACCESS THE MEMORY DURING A SEARCH INCIDENT TO ARREST?

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As electronic technology becomes more readily available, law enforcement officers will increasingly encounter some form of electronic device during a search incident to a lawful arrest. Perhaps no form of electronic technology is more widely in use today than electronic pagers. Individuals in all walks of life use these devices, and electronic pagers are especially widespread among those involved in the illegal drug trade.¹ Consider this typical scenario: A law enforcement officer arrests an individual and, while searching the individual incident to that arrest, discovers an electronic pager attached to the individual's belt. While the seizure of that electronic pager is clearly permissible, the more difficult question to answer is this: May a law enforcement officer access the information stored in the memory of that electronic pager during the search incident to arrest? Or, must the law enforcement officer obtain a search warrant before accessing the memory of the pager?

BACKGROUND

It is firmly ingrained in our system of law that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions.”² It has long been recognized that a search conducted incident to a lawful custodial arrest “is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.”³ In *United States v. Robinson*,⁴ the Supreme Court noted “two historical rationales for the search incident to arrest exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial.”⁵ The Supreme Court later outlined the permissible scope of a search incident to arrest in the 1969 case of *Chimel v. California*,⁶ where they held:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidence items must, of course, be governed by a like rule. A gun on a table or in a drawer in

¹ *United States v. Frost*, 999 F.2d 737, 739 (3rd Cir. 1993)(noting that electronic pagers are “commonly used in drug trafficking”)

² *Mincey v. Arizona*, 437 U.S. 385, 390 (1978)(emphasis in original)(citation omitted)

³ *United States v. Robinson*, 414 U.S. 218, 235 (1973)

⁴ *Id.*

⁵ *Id.*

⁶ 395 U.S. 752 (1969)

front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.⁷

Additionally, a law enforcement officer may also search the contents of a container found on or near the arrestee during a search incident to arrest. As the Supreme Court noted in *New York v. Belton*⁸:

Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.⁹

A search incident to arrest may only be conducted when two (2) requirements have been met. First, there must have been a lawful custodial arrest. At a minimum, this requires that (1) probable cause exist to believe that the arrestee has committed a crime and (2) an arrest is actually made. A search incident to arrest may not be conducted in a situation where an actual arrest does not take place.¹⁰ The second requirement for a lawful search incident to arrest is that the search must be “substantially contemporaneous” with the arrest.¹¹ In *United States v. Turner*,¹² the court stated that a search incident to arrest must be conducted “at about the same time as the arrest.”¹³ While very general, this comment reiterates the Supreme Court's mandate that, when a search is too remote in time or place from the arrest, the search cannot be justified as incident to the arrest.¹

In sum, a law enforcement officer may, during a search performed contemporaneously with a lawful arrest, search the arrestee's person, the area “within his immediate control,” and any containers found on or near his person. With that background, we can now turn our attention to the issue of whether a law enforcement officer may lawfully access the memory of an electronic pager during a valid search incident to arrest.

DISCUSSION

The first case to address the issue of accessing the memory of an electronic pager during a search incident to arrest was *United States v. Chan*.² In *Chan*, federal agents seized an

⁷ *Id.* at 762-763

⁸ 453 U.S. 454 (1981)

⁹ *Id.* at 461

¹⁰ See *Robinson*, 414 U.S. at 235; *McCardle v. Haddad*, 131 F.3d 43 (2nd Cir. 1997)(search incident to arrest not valid where 10 minute detention in backseat of patrol vehicle did not amount to an arrest)

¹¹ *Belton*, 453 U.S. at 460. See also *Stoner v. California*, 376 U.S. 483, 486 (1964) and *Preston v. United States*, 376 U.S. 364, 367-368 (1964)

¹² 926 F.2d 883 (9th Cir.), *cert. denied*, 502 U.S. 830 (1991)

¹³ *Id.* at 887

¹ *Preston*, 376 U.S. at 367

² 830 F. Supp. 531 (N.D. Cal. 1993)

electronic pager that was in the defendant's possession and subsequently searched the pager incident to the arrest "by activating its memory and retrieving certain telephone numbers that were stored in the pager."³ In denying the defendant's motion to suppress the evidence obtained in the search of the electronic pager, the court found that the search was legally conducted incident to the defendant's arrest. In addressing the issue, the court analogized the information stored in the memory of an electronic pager to the contents of a closed container. Citing to the Supreme Court's decision in *Belton*, the court held that "the general requirement for a warrant prior to the search of a container does not apply when the container is seized incident to arrest. The search conducted by activating the pager's memory is therefore valid."⁴

The holding of the court in *Chan* was endorsed in the case of *United States v. Ortiz*.⁵ In *Ortiz*, the Seventh Circuit Court of Appeals held that the activation and retrieval of information from an electronic pager during a search incident to arrest was permissible under the Fourth Amendment. Here, the defendant was arrested in a parking lot and federal agents seized an electronic pager. Shortly thereafter, "one of the agents pushed a button on Ortiz's digital pager, which revealed the numeric messages previously transmitted to the pager."⁶ At trial, the defendant's motion to suppress the evidence obtained from the pager was denied, and he appealed. In affirming the trial court's decision, the court held that:

An officer's need to preserve evidence is an important law enforcement component of the rationale for permitting a search of a suspect incident to a valid arrest. Because of the finite nature of a pager's electronic memory, incoming pages may destroy currently stored telephone numbers in a pager's memory. The contents of some pagers also can be destroyed by merely turning off the power or touching a button. Thus, it is imperative that law enforcement officers have the authority to immediately 'search' or retrieve, incident to a valid arrest, information from a pager in order to prevent its destruction as evidence.⁷

The Fourth Circuit Court of Appeals has similarly held that during a search incident to arrest a law enforcement officer may access the memory of an electronic pager. In *United States v. Hunter*,⁸ the defendant attempted to suppress evidence of telephone numbers taken from his electronic pager by law enforcement officers during a warrantless search following his arrest for narcotics violations. Again, the defendant's motion was denied because the court found the search to be lawful incident to the defendant's arrest. In its decision, the court noted that "Hunter presumably had a reasonable expectation of privacy in the contents of the pager's memory."⁹ Nonetheless, the court noted, "after his arrest, the contours of Hunter's rights are somewhat different. They are tempered by an arresting officer's need to preserve evidence."¹⁰

³ *Id.* at 533

⁴ *Id.* at 536

⁵ 84 F.3d 977 (7th Cir.), *cert. denied*, 519 U.S. 900 (1996)

⁶ *Id.* at 983

⁷ *Id.* at 984 [citing *Robinson*, 414 U.S. at 226 and *United States v. Meriwether*, 917 F.2d 955, 957 (6th Cir. 1990)]

⁸ 166 F.3d 1211 (9th Cir. 1998), *cert. denied*, 525 U.S. 1185 (1999)

⁹ *Id.* [citing *United States v. Chadwick*, 433 U.S. 1, 10-11 (1977)]

¹⁰ *Id.* (citation omitted)

CONCLUSION

In sum, the United States Supreme Court has never directly addressed the scope of a search incident to arrest involving the memory of an electronic pager. However, the federal courts that have addressed the issue have uniformly allowed law enforcement officers to access the information contained in the memory of an electronic pager during a search incident to a lawful arrest.¹¹ These courts, relying upon the Supreme Court's decision in *Robinson, supra*, have consistently recognized a law enforcement officer's need to prevent the destruction of evidence as a basis for conducting a search incident to a lawful arrest. Because an electronic pager has a finite memory, incoming pages may destroy evidence currently contained in the pager's memory. Additionally, a suspect may destroy evidence by either turning the pager off or simply touching a button. These factors justify the warrantless search of an electronic pager seized during a lawful search incident to arrest.

¹¹ See also *United States v. Lynch*, 908 F. Supp. 284 (D.V.I. 1995)(holding that "search and retrieval of the telephone numbers from [the defendant's] pager was justified as being incident to a valid arrest"); *United States v. Reyes*, 922 F. Supp. 818 (S.D.N.Y. 1996)(search of pager fell within search incident to arrest exception to the Fourth Amendment); *United States v. Thomas*, 114 F.3d 403 (3rd Cir. 1997)(dicta); and *Yu v. United States*, 1997 WL 423070 (S.D.N.Y. 1997)

A “MURDER SCENE” EXCEPTION TO THE 4TH AMENDMENT WARRANT REQUIREMENT?

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It is firmly ingrained in our system of law that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions.”¹ This brief statement emphasizes the preference in this country for obtaining warrants prior to conducting searches. Nonetheless, the courts have outlined a number of “established and well-delineated” exceptions to the warrant requirement of the Fourth Amendment, including, but certainly not limited to, consent searches; searches of vehicles; searches incident to arrest; and inventory searches. However, one exception to the warrant requirement which the Supreme Court has expressly and repeatedly refused to recognize is a general “murder scene” exception. Even so, in speaking with numerous Federal law enforcement officers, many of whom have a state or local law enforcement background, it appears that a misconception regarding this point continues to exist. Most of those with whom I have spoken believe that such an exception is alive and well, and that in the course of investigating a homicide, no warrant is required to “process” the crime scene. The purpose of this article is to review the Supreme Court’s rulings on this issue, so that Federal law enforcement officers are fully cognizant of how it has been addressed by the Court in the past.

The Supreme Court first addressed this issue in the 1978 case of *Mincey v. Arizona*.² In *Mincey*, an undercover officer was shot and killed by the defendant during a narcotics raid. In addition to the undercover officer, the defendant and two other persons in the apartment were wounded in the shootout. The officers on scene secured the apartment, made a search for additional victims, and arranged for medical assistance. However, pursuant to police directives, they refrained from any further investigation. Within 10 minutes of the shooting, two homicide detectives arrived at the apartment. After supervising the removal of the undercover officer and the other wounded persons, the homicide detectives began to gather evidence. As described by the Supreme Court:

Their search lasted four days, during which period the entire apartment was searched, photographed, and diagramed. The officers opened drawers, closets, and cupboards, and inspected their contents; they emptied clothing pockets; they dug bullet fragments out of the walls and floors; they pulled up sections of the carpet and removed them for examination. Every item in the apartment was closely examined and inventoried, and 200 to 300 objects were seized. In short, *Mincey*’s apartment was subjected to an exhaustive and intrusive search. No warrant was ever obtained.³

¹ *Mincey v. Arizona*, 437 U.S. 385, 390 (1978)(emphasis in original) (citation omitted)

² *Id.*

³ *Id.* at 437 U.S. 389 (footnote omitted).

At his trial, Mincey's motion to suppress the evidence from the search was denied. The Arizona Supreme Court affirmed the trial court's ruling, holding that the "... warrantless search of the scene of a homicide - or of a serious personal injury with likelihood of death where there is reason to suspect foul play - does not violate the Fourth Amendment ... where the law enforcement officers were legally on the premises in the first instance...."⁴

In a unanimous opinion, the U.S. Supreme Court reversed, concluding that "... the 'murder scene' exception created by the Arizona Supreme Court is inconsistent with the Fourth and Fourteenth Amendments - that the warrantless search of Mincey's apartment was not constitutionally permissible simply because a homicide had recently occurred there."⁵ The Court expressly rejected the State's assertion that the search of Mincey's apartment was justified on the basis of "exigent" circumstances.

Except for the fact that the offense under investigation was a homicide, there were no exigent circumstances in this case.... There was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant. Indeed, the police guard at the apartment minimized that possibility. And there is no suggestion that a search warrant could not easily and conveniently have been obtained. We decline to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search.⁶

While rejecting the State's argument regarding exigent circumstances, the Supreme Court nonetheless noted a number of permissible actions that a law enforcement officer may take at a homicide scene in the absence of a warrant. First, if law enforcement officers reasonably believe that a person inside a premises is in need of emergency assistance, they may make a warrantless entry and conduct a search for victim(s). Additionally, when the police arrive at a homicide scene, they may immediately conduct a warrantless search to determine if there are additional victims or if the killer is still on the premises.⁷ Any evidence observed by the officers during the course of these lawful activities may be seized pursuant to the plain view doctrine. However, the scope of the search conducted must be consistent with a legitimate search for emergency reasons. The Court emphasized that "... a warrantless search must be 'strictly circumscribed by the emergencies which justify its initiation'. "⁸ Finally, the officers may secure the premises for a reasonable amount of time necessary to secure a search warrant.⁹

In this case, the initial entry by the officers was justified. However, once all the shooting victims had been evacuated, and the officers had secured the premises to prevent the destruction or removal of evidence, the emergency situation justifying the warrantless entry ended. To

⁴ Id. at 437 U.S. 389-390 (citation omitted).

⁵ Id. at 437 U.S. 395 (footnote omitted).

⁶ Id. at 437 U.S. 394 (emphasis added) (citation omitted).

⁷ Id. at 437 U.S. 392 (citations omitted) ("The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an emergency or exigency").

⁸ Id. at 437 U.S. 393 (citation omitted)

⁹ *Segura v. United States*, 468 U.S. 796 (1984)(Premises secured for 19 hours from within to preserve evidence while officers obtain search warrant).

continue searching, the officers were required to have either a warrant or an exception to the warrant requirement.

Such was the state of the law when, in 1984, the Supreme Court decided the case of *Thompson v. Louisiana*.¹⁰ In *Thompson*, the defendant fatally shot her husband, then attempted to commit suicide through an overdose of pills. However, before losing consciousness, the defendant placed a telephone call to her daughter and revealed what had happened. The daughter immediately notified the police, who arrived at the house and located the victim and the defendant. Both were taken to the hospital for medical assistance, and the residence was secured. Just over ½ hour later, two homicide detectives arrived and, without a warrant, began a “general exploratory search for evidence”¹¹ that lasted approximately two hours. Three key pieces of evidence were discovered during this warrantless search: First, a pistol found inside a chest of drawers in the same room where the victim’s body was found; second, a note found in a wastebasket in an adjoining bathroom; and third, a suicide note found inside an envelope on top of a chest of drawers. Citing their earlier decision in *Mincey*, the Supreme Court held that the warrantless search violated the Fourth Amendment, in that no warrant was obtained and the search did not fall within one of the recognized exceptions to the warrant requirement.

In *Mincey v. Arizona* ... we unanimously rejected the contention that one of the exceptions to the Warrant Clause is a “murder scene exception.” Although we noted that police may make warrantless entries on premises where “they reasonably believe that a person within is in need of immediate aid ... and that ‘they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises,’ ... we held that “the murder scene exception” ... is inconsistent with the Fourth and Fourteenth Amendments....¹²

The Court noted that the initial entry by the officers into the defendant’s home was justified to look for victims or others in need of emergency medical assistance. However, once both the defendant and her deceased husband were removed from the residence, the emergency justifying the warrantless entry ended, especially in light of the fact the residence was secured so as to effectively prevent the loss or destruction of evidence located within. The “general exploratory search” that was commenced required either a search warrant or an “established and well-defined” exception, neither of which was present in this case.

In a more recent opinion, the Supreme Court once again expressly refuted any notion that a “murder scene” exception to the warrant requirement of the 4th Amendment exists. In *Flippo v. West Virginia*¹³, police officers arrived at a cabin in a state park, where the defendant notified them he and his wife had been attacked and his wife had been murdered. Officers immediately entered the cabin and located the body of the victim. The defendant was transported to the hospital, while the officers secured the crime scene. A few hours later, the officers reentered the cabin and began to “process” the crime scene. “For over 16 hours, they took photographs,

¹⁰ 469 U.S. 17 (1984)

¹¹ Id. (citations omitted).

¹² Id. at 469 U.S. 21 (citations omitted).

¹³ 120 S.Ct. 7 (1999).

collected evidence, and searched through the contents of the cabin.”¹⁴ However, no search warrant had been obtained. During this search, the officers found “... a briefcase, which they, in the ordinary course of investigating a homicide, opened, wherein they found and seized various photographs and negatives.”¹⁵ The photographs found suggested a possible motive for the murder. The Circuit Court of West Virginia denied the defendant’s motion to suppress the evidence. However, the Supreme Court reversed, concluding that the photographs had been discovered during a warrantless search for which no exception to the warrant requirement existed. Again, the Court emphasized that there is no “murder scene” exception to the Fourth Amendment’s warrant requirement. Further, they determined that:

It seems implausible that the court found that there was a risk of intentional or accidental destruction of evidence at a ‘secured’ crime scene or that the authorities were performing a mere inventory search when the premises had been secured for “investigative purposes” and the officers opened the briefcase “in the ordinary course of investigating a homicide.”¹⁶

In sum, the Supreme Court has addressed the issue of a “murder scene” exception to the warrant requirement on three separate occasions spread out over a 20-year period. In each instance, the Court has emphatically rejected the notion that such an exception exists. Nonetheless, as noted above, there appears to be a misconception among law enforcement officers regarding the viability of a “murder scene” exception to the warrant requirement. This misconception can most likely be attributed to the concept of “standing.”

“Standing” simply means that an individual has a reasonable expectation of privacy (REP) in the item or place searched. If an individual does not have REP, he or she cannot object to the illegality of the search, because they have no standing to do so. In most instances where officers search a premises under the fictional “murder scene” exception, the evidence found is admissible against the defendant, not because the warrantless search was permissible, but because the defendant had no REP in the premises and cannot object to the legality of the search. For example, assume A (an intruder) breaks into B’s home and murders B. Officers arrive and conduct a warrantless search of B’s premises, which results in an abundance of evidence being seized. While technically the search was in violation of the Fourth Amendment, the evidence found in B’s home would still be admissible against A, because A has no standing to object to the impermissible search of B’s home. This result can ultimately lead law enforcement officers to the false conclusion that search warrants are not required when processing a “murder scene.” The problem with such a conclusion, however, is clearly illustrated in *Mincey*, *Thompson*, and *Flippo*, cases in which the defendant had REP in the premises and where the unlawful search resulted in the suppression of evidence.

¹⁴ Id. at 120 S.Ct. 7.

¹⁵ Id.

¹⁶ Id.

THE U.S. PATRIOT ACT of 2001

CHANGES TO ELECTRONIC SURVEILLANCE LAWS

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Shortly after the terrorist attacks that occurred on September 11, 2001, Congress passed the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism,” commonly referred to as the “U.S. Patriot Act of 2001.” The purpose of this article is to highlight some of the resulting major changes in electronic surveillance laws. This article is not intended to be a comprehensive summary of all of the changes brought by the legislation.

TERRORISM AS A PREDICATE OFFENSE

Title 18 U.S.C. § 2516 lists the predicate offenses for which wire, oral, or electronic intercept orders may be authorized, upon a showing of probable cause to believe the offense is being committed. “The offenses that may be the predicate for a wire or oral interception order are limited to only those set forth in ... § 2516(1).”¹ With passage of the “U.S. Patriot Act,” crimes “relating to terrorism” have now been made predicate acts for wire or oral interception orders, as have offenses “relating to chemical weapons.”²

PEN REGISTERS AND TRAP AND TRACE DEVICES

Title 18 U.S.C. §§ 3121 – 3127 outline the federal requirements for use of pen registers and trap and trace devices.³ Prior to passage of the “U.S. Patriot Act,” the statutory definitions of these two devices did not explicitly allow for their use to capture Internet communications, such as capturing the “To” and “From” information contained in an e-mail header. The “U.S. Patriot Act” modified these definitions, and they now expressly authorize utilization of pen registers and trap and trace devices on Internet communications. Further, Title 18 U.S.C. § 3123(a) previously allowed for the issuance of a court order authorizing a pen register or trap and trace device only “within the jurisdiction” of the issuing court. The “U.S. Patriot Act” now allows for a court to issue a single order that is valid “anywhere within the United States.”⁴

VOICE MAIL STORED WITH THIRD PARTY PROVIDER

Title 18 U.S.C. § 2510(1) included within its definition of “wire communication” the

¹ *United States Attorney’s Manual*, Title 9, Criminal Resource Manual 28.

² Title 18 U.S.C. § 2516(1)(q)

³ “A pen register records outgoing addressing information (such as a number dialed from a monitored telephone), and a trap and trace device records incoming addressing information (such as caller ID information).” *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* at 148, Computer Crime and Intellectual Property Section, Criminal Division, Department of Justice (2001)

⁴ Title 18 U.S.C. § 3123(a)(1)

phrase “any electronic storage of such communication.” Additionally, the Electronic Communications Privacy Act of 1986 (ECPA) addressed law enforcement access to stored “electronic” communications held by a third party provider, but not stored “wire” communications. Thus, voice mail stored with a third party provider could not be obtained by a law enforcement officer with a search warrant (as could “electronic communications”), but required a Title III interception order. The “U.S. Patriot Act” amended the ECPA, and now authorizes law enforcement officers to use search warrants to compel disclosure of voice mail stored with a third party provider. This provision of the “U.S. Patriot Act” will expire on December 31, 2005.

COMPUTER HACKING INVESTIGATIONS

Prior to passage of the “Patriot Act,” investigators were not permitted to obtain interception orders for wire communications in computer hacking investigations. Title 18 U.S.C. § 2516(1) has now been amended to include violations of Title 18 U.S.C. § 1030 (Computer Fraud and Abuse) as predicate offenses. However, this provision of the “U.S. Patriot Act” will expire on December 31, 2005.

OBTAINING INFORMATION FROM THIRD PARTY PROVIDERS WITH A SUBPOENA

Title 18 U.S.C. § 2703 outlined the information a law enforcement officer could obtain with a subpoena from a third party provider of electronic communication (e.g., AOL). Termed “basic subscriber information,” it included a customer’s name, address, local and long distance telephone toll billing records, etc.⁵ Other types of information, such as credit card numbers used, could only be obtained with a search warrant or § 2703(d) court order. The “U.S. Patriot Act” expands “basic subscriber information” to now include “means and source of payment for such service (including any credit card or bank account number),” “records of session times and durations,” and “telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address.”⁶

SEARCH WARRANTS FOR WIRE AND ELECTRONIC COMMUNICATIONS HELD BY THIRD PARTY PROVIDER

Prior to passage of the “U.S. Patriot Act,” the ECPA required that law enforcement officers use a search warrant to compel a third party provider of electronic communications to disclose communications in storage “for one hundred and eighty days or less.”⁷ Pursuant to Rule 41 of the Federal Rules of Criminal Procedure, only a court in the district where the actual communication was located could issue this search warrant. Now, any court “with jurisdiction over the offense under investigation” can issue a nationwide search warrant for communications stored by third party providers, regardless of where the communication is physically located. And, as noted in paragraph III, above, “wire communications” are now covered by this rule. This provision of the “U.S. Patriot Act” will expire on December 31, 2005.

⁵ Title 18 U.S.C. § 2703(C)

⁶ Title 18 U.S.C. § 2703(c)(2)

⁷ Title 18 U.S.C. § 2703(a)

DELAYED NOTICE OF SEARCH WARRANTS

Title 18 U.S.C. § 3103a has been amended to permit law enforcement officers to delay notice of the execution of a search warrant in special circumstances. Specifically, § 3103a permits notice to be delayed in situations where “the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result.” An “adverse result” is defined as (a) endangering the life or physical safety of an individual; (b) flight from prosecution; (c) destruction of or tampering with evidence; (d) intimidation of potential witnesses; or (e) otherwise seriously jeopardizing an investigation or unduly delaying a trial.”⁸

⁸ Title 18 U.S.C. § 2705(a)(2)

THE NEWEST CONSTITUTIONAL RIGHT – THE RIGHT TO *MIRANDA* WARNINGS

Jacquelyn Kuhens
Senior Legal Instructor

Until June 26, 2000, a person who was in custody and being subjected to police interrogation did not have a Constitutional right to be given *Miranda* warnings; *Miranda* warnings were just the mechanism by which a state or Federal law enforcement officer ensured that the subject of his custodial interrogation knew what his or her rights were before the interrogation began. If a law enforcement officer conducted a custodial interview without first giving *Miranda* warnings, it was not a Constitutional violation, and so the worst that could happen was the suppression of the improperly obtained statement. Today, because a person in custody has a Constitutional right to be given his *Miranda* rights, is it possible, even likely, that failure to give a subject *Miranda* rights will serve as the basis for a *Bivens* or Title 42, United States Code, Section 1983 civil rights claim? Only time will tell. Why did the Rehnquist Supreme Court, in an opinion authored by the Chief Justice himself, take this momentous step? To find the answer, we must look to the decision of *Dickerson v. United States*, 530 U.S. 428 (June 26, 2000) itself.

The essence of the Rehnquist decision is that a simple voluntariness test is too difficult to apply when trying to determine whether a statement that is taken without the benefit of *Miranda* warnings is reliable enough to be presented to a jury. Until the decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), the courts had fluctuated between concerns over meeting the requirements of the Fifth Amendment (“no person shall be compelled in any criminal case to be a witness against himself”) and due process issues under the Fifth and Fourteenth Amendments, which required that no confessions should be coerced or obtained by overcoming a person’s voluntary free will.

In *Miranda*, the Supreme Court found that custodial interrogations by their very nature are coercive, and that in order to combat the coercive atmosphere, a subject had to be informed, in language that he could understand, of four fundamental rights: the right to remain silent, the act that anything he said could be used against him in court, the right to have an attorney present during questioning, and that one would be appointed to represent him prior to any questioning if he could not afford to hire one. In *Dickerson*, Chief Justice Rehnquist states that *Miranda* laid down “concrete constitutional guidelines for law enforcement agencies and courts to follow.”

In his decision in *Dickerson*, the Chief Justice comes to the conclusion that the rights set forth in *Miranda* are constitutional in nature based upon the fact that the *Miranda* decision and its two companion cases were state cases, not Federal; the U.S. Supreme Court does not have supervisory jurisdiction over state courts, and therefore the decision must have been Constitutionally based. The Chief Justice states: “*Miranda* requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored.” The opinion further states that even if this Court would not have issued *Miranda* in the first place, because it is already in place, there must be compelling reasons

to overturn it, and none have been presented. *Miranda* warnings have become such a part of our culture that this Court will not overturn them, and now they have Constitutional stature.

What is the practical result of *Dickerson* to a Law Enforcement Officer? Because of this decision, Law Enforcement Officers will need to be even more careful when evaluating a situation to determine whether, from the perspective of the subject, he or she reasonably could feel that it was a custodial interview. If the answer to that question is yes, then *Miranda* warnings must be given fully and properly. If an officer fails to give *Miranda* warnings in a situation that is later determined to have required them, under the decision issued in *Dickerson*, this would appear to be a violation of the subject's Constitutional rights. Will the failure to give *Miranda* warnings be grounds for a *Bivens* or §1983 action? Unfortunately, I believe that the answer, as a result of this decision, will be yes.

THE SIXTH AMENDMENT RIGHT TO COUNSEL AND ITS INSTANTANEOUS ATTACHMENT AT THE MOMENT OF INDICTMENT

Jacquelyn J. Kuhens
Senior Legal Instructor

For many agents and officers, it is difficult to remember when the rules of the Fifth Amendment apply concerning the giving of Miranda warnings, and when the Sixth Amendment right to counsel is engaged. It is easy to remember the Fifth Amendment rule of “custody + police questioning = *Miranda* warnings”, but often the Sixth Amendment right to counsel has attached before any custodial situation occurs. This article will examine when the Sixth Amendment right to counsel attaches, and what a LEO must do in order to ensure that any statements made after the Sixth Amendment right to counsel has attached will be admissible.

The courts have clearly stated that the Sixth Amendment right to counsel attaches at Initial Appearance, Indictment, or the filing of an Information. Once attached, the Sixth Amendment right to counsel is attached for all critical stages in the proceedings, which includes all motion hearings, trials, lineups, voice or handwriting exemplars, and any other attempt to obtain evidence from the person of the defendant. While it is easy to understand that once the court process has begun, the defendant has the Sixth Amendment right to counsel, what about the situation where the defendant has been indicted via a sealed indictment?

The courts have held that the Sixth Amendment right to counsel attaches at the instant that a person is indicted, whether that indictment is sealed or unsealed. Thus, in order to use a statement from a person who is indicted but does not know it, a valid *Miranda* warning must be given, and a valid waiver must be obtained before any statements will be admissible. The issue of custody and police questioning is no longer an issue from the moment of indictment forward, because it is no longer a Fifth Amendment right to counsel that is being protected, but the Sixth Amendment right to counsel because indictment is a critical stage in the proceedings.

In *United States v. Charria*, 919 F.2d 842 (2nd Cir. 1990) Charria was arrested on an indictment for charges of conspiracy to distribute narcotics and money laundering violations. At the time of his arrest, Charria was shown a copy of the arrest warrant, which stated that it was based on an indictment and set forth the charges, but he was not specifically informed that he was under indictment. Charria spontaneously said “I did not do anything,” was stopped from saying anything further, and *Miranda* warnings were administered in English and Spanish. Charria executed a waiver of his *Miranda* rights and denied any involvement in criminal activity. Charria signed a consent to search, and when a redrope folder full of drug records was found, Charria said “that’s what’s going to get me in trouble”. More records were found in the trash and partially burned outside, and Charria made incriminating statements concerning the source of these documents. On appeal, Charria claimed that his waiver of his Sixth Amendment right to counsel was not valid due to the fact that he was not informed specifically that he was under indictment.

The United States Court of Appeals for the Second Circuit held that although Charria had the right to assistance of counsel at the time that he was arrested due to the fact that he had already been indicted, the *Miranda* warnings he received informed Charria of his Sixth Amendment right to counsel, and therefore his waiver was a knowing and intelligent waiver of his Sixth Amendment right to counsel. 919 F.2d at 848. Thus, the defendant does not need to know that he is being given his *Miranda* rights in order to inform him of his Sixth Amendment right to counsel, he just has to be told of his right to counsel so that he can either exercise it or waive it.

In *United States v. Gibbons*, 1993 U.S. Dist. LEXIS 9862 (S.D.N.Y. July 19, 1993), the defendant tried the same argument, with the same results. Gibbons was arrested pursuant to a Federal arrest warrant issued on a Federal indictment for Hobbs Act violations. At no time during the arrest was Gibbons told that he was under indictment, but he was told the charges for which he was being arrested. After the arrest, Gibbons was given his *Miranda* rights off of a card, he acknowledged his rights, he waived his rights, and then made incriminating statements. When Gibbons appealed and claimed that before a Sixth Amendment waiver of rights can be valid, the defendant must be told that he is under indictment, the United States District Court for the Southern District of New York followed Charria, and said that a valid *Miranda* warning is sufficient to protect Sixth Amendment rights, even where a person does not know that they have been indicted.

The Sixth Amendment right to counsel is charge specific, which means that the right attaches only to the charges contained in the indictment or other charging document, and not to any uncharged activity which is still being investigated. Thus, if a defendant is out on bond awaiting trial on credit card fraud, and a LEO wants to talk to him about an unrelated drug investigation, the LEO may approach the defendant and seek to talk to him without first contacting his attorney or giving him *Miranda* warnings. But what about the situation where the defendant has been indicted on a series of related charges, and the LEO has information that the defendant continues to commit crimes or is intending to commit another crime in furtherance of the crimes on which he is already indicted?

Such a situation arose in *United States v. Arnold*, 106 F.3d 37 (3rd Cir. 1997). Arnold was involved in a series of armored car robberies, which he confessed to his girlfriend. Thereafter, he became concerned that his girlfriend might go to the police with this information, so he devised a plan to have her murdered. The FBI obtained a sealed indictment charging him with bank theft, money laundering and witness intimidation, specifying the fact that Arnold had threatened to kill his girlfriend if she gave information about him to LEOs. The indictment was issued in the morning; that same afternoon another meeting between Arnold and the undercover FBI agent took place, which was video- and tape-recorded. During this meeting, Arnold reaffirmed his desire to have his girlfriend killed, and showed the money for the job to the agent. Arnold was arrested at the conclusion of this meeting. The government obtained a superceding indictment, adding a charge of attempted murder of a witness.

On appeal, Arnold claimed that the government had violated his Sixth Amendment right to counsel by eliciting uncounseled statements from him after he had been indicted for threatening to kill his girlfriend. Arnold claimed that because the sealed indictment had been returned against him, his right to counsel had attached for the witness intimidation charge, and

that the government was prohibited by the Sixth Amendment from deliberately eliciting uncounselled statements about the closely related attempted murder offense.

The United States Court of Appeals for the Third Circuit agreed, holding that the Sixth Amendment right to counsel attaches “at or after the initiation of adversary judicial criminal proceedings whether by way of formal charge, preliminary hearing, indictment, information or arraignment”. 106 F.3d at 40, citing *Kirby v. Illinois*, 406 U.S. 682, 688-689 (1972). “Under the Sixth Amendment, the government is prohibited from deliberately eliciting incriminating evidence from the accused after he has been indicted and in the absence of his counsel.” *Massiah v. United States*, 377 U.S. 201, 206 (1964)”, 106 F.3d at 40. The Court went on to recognize that while the Sixth Amendment right is charge specific, only attaching to those crimes which have been charged in the indictment, in this instance, where the original charge was witness intimidation and the superceding charge included attempted murder of the same witness, these charges were too intertwined. Therefore, the Sixth Amendment right to counsel which had attached that morning when the first, sealed indictment was returned was violated by the same-day afternoon meeting to discuss the plans for the murder. 106 F.3d at 42.

How could this situation arise in the future? An interagency team of agents are investigating a large drug ring, consisting of what is believed to be 20 to 30 individuals. The investigation has been ongoing for six or eight months, and one of the confidential informants is “Petey”, a low-level dealer who was arrested by the locals on a related charge who has flipped. The team, in conjunction with the AUSA, have made a determination that it is wise to go ahead and obtain a sealed indictment for the 14 individuals for which probable cause exists at this time, so that if anything goes wrong, there are arrest warrants already in place and at least these 14 can be taken out of circulation. One of the 14 individuals who is named in the conspiracy count and two of the substantive counts is “Petey”. This charging decision was made for several reasons: to protect from immediate discovery as the snitch when the arrests occur, and to ensure that if “Petey” decides to double-cross the Government, there is a warrant for him.

Two days after the indictment is returned and sealed, you run into “Petey” in a bar where you usually meet to gather information from him. “Petey” says that he has information for you concerning your investigation, and that it is really good. What can you do? Can you talk to him without giving him *Miranda* warnings? Remember, “Petey” now has a Sixth Amendment right to counsel on the three charges on which he has been indicted, one of which is conspiracy, so it is likely that everything that “Petey” is going to tell you could be relevant evidence against “Petey” on that charge. You have several choices: 1) You can refuse to talk to “Petey”: this approach will have a detrimental effect on your investigation and probably cause you to lose your informant; 2) You can talk to *Miranda* warnings: this approach will result in everything that “Petey” says to you being inadmissible against “Petey”, because the statement will be taken in violation of “Petey’s Sixth Amendment right to counsel on these charges; 3) You can act non-committal, let “Petey” talk to you voluntarily, and not ask any follow up questions: this approach is very difficult to execute, and will certainly tip “Petey” off that something is not quite right; or 4) You can give “Petey” his *Miranda* rights in a non-confrontational way, and have “Petey” waive his rights: this approach, if done properly, will result in your being able to obtain all the information from “Petey” and having it be admissible if needed against “Petey” on the charges in the indictment at a later date.

How can a LEO give *Miranda* warnings in this situation and not tip off the informant that he has been indicted? A method that has worked for Federal LEOs in the past is to say something along these lines: Oh, hi, “Petey”, how are you doing? So you have some stuff for me? Before we go into that, you know that we have been working as a team, and that I am looking out to protect you, right? Well, I got to thinking, and I want you to be clear and me to be clear that you are talking to me voluntarily, so from now on, whenever we talk, I am going to give you your *Miranda* warnings. Are you under arrest? No, I’m not taking you in. I just need to do this for you and for me. So here goes: you have the right to remain silent. Anything you say can be used against you in court. You have the right to consult with an attorney and to have them present during questioning. If you cannot afford an attorney, one will be appointed to represent you prior to any questioning. Do you understand your rights? Are you willing to waive these rights and talk to me?

Under the case law outlined above, if a LEO takes this approach and “Petey” waives his rights, he has waived his Sixth Amendment right to counsel and anything that he says can be used against him later. Remember however, that the *Miranda* warnings must be given each time the LEO has a conversation with “Petey” in which potentially incriminating information is being given; this includes conversations over the telephone.

Finally, it is important to remember that any time that the Sixth Amendment right to counsel has attached and the defendant is represented by counsel, there are explicit Department of Justice policies concerning contacts with represented parties. A LEO must always discuss any desire to speak with a represented defendant or party with an Assistant United States Attorney or other Department of Justice attorney in order to ensure that such contacts do not violate the DOJ policy, ethics rules and regulations, or laws, thereby putting the LEO’s and the attorney’s career in jeopardy. The Sixth Amendment right to counsel is an absolute right, which attaches at the instant of Initial Appearance, Indictment or the filing of the Information, whichever occurs first. Always determine the status of charges against your target, so that you can know whether you are concerned with the Fifth Amendment issues of custody and police questioning, or the Sixth Amendment right to counsel. Remember, when giving *Miranda* rights, it does not matter what the defendant thinks as to why he is being told of his rights, all that matters is that he receive them and make a knowing, intelligent and voluntary waiver of those rights.

JUVENILE MIRANDA RIGHTS

Joey L. Caccarozzo
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This article will discuss a juvenile's *Miranda* rights, what constitutes a valid waiver of those rights, and what officers must do to make sure a juvenile's confession will not be suppressed in court.

BACKGROUND

Before the twentieth century, juveniles were treated and sentenced as adults. It was not until the Industrialization Era that society developed the *parens patriae* concept, that the state could intervene to protect a child's welfare.¹ The juvenile court that developed in the 1900's was very different from the adult court by having informal proceedings, proceedings based on civil law, closed proceedings, emphasis on helping the child, and lack of jury trials.²

The juvenile court system remained virtually unchanged until the Supreme Court decision, *In Re Gault* in 1967³ which held that the due process clause of the Fourteenth Amendment applied to juvenile court proceedings. The opinion states that juveniles have 1) a right to notice, 2) a right to counsel, 3) a right to confront witnesses, and 4) a privilege against self-incrimination in hearings that could result in them being confined to an institution.⁴ The juvenile's right to notice includes being advised in a timely manner of the charges against them and notice to parents when their child has been taken into custody. Juveniles have the right to have an attorney present during all phases of the proceedings. If they cannot afford an attorney, one will be appointed for them.⁵ Juveniles have the right to cross-examine witnesses. Finally, the Court extended the *Miranda* decision to apply to juveniles as well as adults.

REQUIREMENTS

FEDERAL JUVENILE DELINQUENCY ACT

18 USC § 5033

Custody prior to appearance before magistrate.

Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile, and shall

¹ David W. Neubauer, *America's Courts and the Criminal Justice System* (6th ed., West/Wadsworth 1998).

² *Id.*

³ *Id.*

⁴ *In Re Gault*, 387 U.S. 1 (1967).

⁵ *Id.* at 41.

immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of such custody. The arresting officer shall also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.

The juvenile shall be taken before a magistrate forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate.

In *Fare v. Michael C.*, The Supreme Court ruled that a totality of the circumstances test is adequate to determine a valid waiver of rights during an interrogation of a juvenile.⁶ The court must look to all circumstances surrounding the interrogation. Some factors to consider are the juvenile's age, education, experience, intelligence, background, and whether the juvenile understands the warnings given and the consequences of waiving those rights.⁷ In this case, the juvenile was 16 ½, was currently on probation, had a record of prior offenses, had spent time in a youth corrections camp, was of average intelligence, and there was no coercion used. Therefore, under the totality of the circumstances, the juvenile voluntarily waived his rights and the confession was admitted.

The Ninth Circuit Court of Appeals uses a three-part test for reviewing Juvenile Delinquency Act violations.⁸ First, the Court asks whether the government violated § 5033.⁹ If the answer is yes, the next question is whether the government's conduct was so outrageous that it deprived the juvenile of their due process rights.¹⁰ If the answer to the second question is yes, then the case is reversed.¹¹ Even if the answer is no, the court also has discretion to reverse the case if the defendant was "prejudiced."¹² The Ninth Circuit uses a two-step test to determine prejudice – 1) was the § 5033 violation a cause of the confession (isolation from family, lack of advice from counsel, etc.) and 2) what was the prejudice caused by the confession.¹³ For example, was the prosecution and conviction based primarily on the confession?

SCOPE

The State must make a good faith effort to locate a juvenile's parents or guardian before beginning questioning.

In the case *U.S. v. Burrous*, the defendant was arrested for armed robbery.¹⁴ One of the arresting agents asked the defendant three different times how his parents or

⁶ *Fare v. Michael C.*, 442 U.S. 707 (1979).

⁷ *Id.* at 725.

⁸ *U.S. v. Juvenile (RRA-A)*, 229 F.3d 737 (9th Cir. 2000).

⁹ *Id.* at 744.

¹⁰ *Id.* at 744.

¹¹ *Id.* at 744.

¹² *Id.* at 744.

¹³ *Id.* at 747.

¹⁴ 147 F.3d 111 (2nd Cir. 1998).

guardian could be contacted and the defendant replied that he did not know how either his mother, father, or brother could be contacted. The defendant did not give the agents enough information to locate his relatives and he did not attempt to contact anyone himself. The defendant voluntarily waived his *Miranda* rights and confessed. The court ruled that law enforcement officers made good faith efforts to locate juvenile's parents and that his confession was admissible.¹⁵

A juvenile's parents or guardian must be advised of the juvenile's rights immediately, according to §5033.

In *U.S. v. John Doe*, the court said that even though the agents attempted to notify the juvenile's parents before they began to question him, it was three and a half hours after he was taken into custody and, therefore, not "immediate" under § 5033.¹⁶

The arresting officer has the responsibility to notify parents or guardians that the juvenile is in custody.

In *U.S. v. Juvenile (RRA-A)*, the arresting officer twice delegated his job of notifying a juvenile's parents or consulate - first to an AUSA and second to a secretary in the United States Attorney's office.¹⁷ (The juvenile was a foreign national whose parents were not in the United States. Therefore, the appropriate consulate should have been contacted.) The arresting officer must comply with § 5033 unless there are extenuating circumstances.¹⁸ This type of violation alone will not result in reversal, because it is not considered a due process violation. In this case, because the officer delegated his duties and the consulate was not contacted before the interrogation and the court ruled that these § 5033 violations were prejudicial. The juvenile's confession was suppressed.¹⁹

A juvenile must be brought before a magistrate "forthwith," according to § 5033.

The Ninth Circuit held that a 34-hour delay was reasonable where no magistrate judge was available, the agents were busy with other urgent cases, and the government agreed not to use the pre-arraignment statement of the juvenile.²⁰

A 31-hour delay caused by a U.S. Marshal policy that only accepted juvenile prisoners at the courthouse between 7:00 and 8:00 a.m. was ruled "prejudicial."²¹ Because the policy assured that the arraignment of a juvenile would be delayed longer than a "similarly situated adult,"²² it violated § 5033 and would not be considered an extenuating circumstance.²³

¹⁵ *Id.* at 113.

¹⁶ 219 F.3d 1009, 1015 (9th Cir. 2000).

¹⁷ 229 F.3d 737 (9th Cir. 2000).

¹⁸ *Id.* at 745.

¹⁹ *Id.* at 747.

²⁰ *U.S. v. Doe*, 701 F.2d 819, 824 (9th Cir. 1983).

²¹ *U.S. v. John Doe*, 219 F.3d 1009 (9th Cir. 2000).

²² *Id.* at 1013.

²³ *Id.* at 1014.

A juvenile's confession was considered voluntary when his will was overborne by his mother, not by police officers, after he invoked his right to silence.

Officers ceased questioning a juvenile after the juvenile invoked his right to silence. The juvenile's mother convinced him to talk freely with the officer, which led to his confession. The juvenile's parents were present during the interrogation and the law enforcement officer did not use any coercion to get the juvenile to confess. The juvenile's confession was deemed voluntary by the Tenth Circuit.²⁴

A juvenile's request for counsel and right to remain silent should be asserted in a clear manner.

In *Fare v. Michael C.*, after the juvenile was read his *Miranda* rights, he asked to speak to his probation officer.²⁵ The officers refused and the juvenile was again read his rights. This time he agreed to speak without an attorney present. A probation officer is duty bound to report the juvenile if the juvenile gets into trouble. Because of this a conflict of interest, the probation officer does not represent the juvenile in the same sense as an attorney.²⁶ There is no right to a probation officer during questioning; nor does such a request constitute an invocation of the right to remain silent. The juvenile never requested an attorney. Based on the taped interrogation, using the totality of the circumstances test, the Court decided that the juvenile clearly waived his *Miranda* rights.

CONCLUSION

Once a juvenile is in custody, the arresting officer must make a good faith effort to notify the juvenile's parents or guardian to tell them that the child has been taken into custody, what offense the child was accused of committing and the juvenile's *Miranda* rights. A juvenile's *Miranda* rights must be given in a language that the juvenile can understand. The confession must also be otherwise voluntary. If the juvenile requests an attorney or invokes his/her right to remain silent, the interrogation must stop immediately. The juvenile must appear before a magistrate "forthwith." If the juvenile is not afforded these due process rights, the confession may be suppressed.

²⁴ *U.S. v. Erving L.*, 147 F. 3d 1240 (10th Cir. 1998).

²⁵ 442 U.S. 707 (1979).

²⁶ *Id.* at 720.

UPDATE ON THE FEDERAL JUVENILE DELINQUENCY ACT 18 U.S.C. § 5033

Former Legal Division Intern, Joey Caccarozzo, wrote an article for the October 2001 *The Quarterly Review* on Juvenile *Miranda* Rights under the Federal Juvenile Delinquency Act. There is another recent circuit court case which found a violation of the Act, resulting in the suppression of a confession.

In *U.S. v. Female Juvenile (Wendy G.)*, 255 F.3d 761 (9th Cir. 2001), the agent called the juvenile's mother within one hour of the arrest on drug charges. The agent informed the mother of the charges and her daughter's *Miranda* rights. When the mother asked where and when she could speak to her daughter, the agent gave her directions to the Federal Building and the time the next day when her daughter would be there. The mother was not told she could talk with her daughter before questioning. The agent got the juvenile's *Miranda* waiver and her confession to drug smuggling. Trial testimony indicated that if the mother had been allowed to speak to her daughter before the interview, she would have advised her not to talk to the agent.

The court held that the agent's failure to inform the mother that she could confer with her daughter before any interrogation violated the Act's requirement to give juveniles "access to meaningful support and counsel." The court concluded that the violation of the Act caused the confession, which was highly prejudicial. The confession was suppressed.

CHANGES TO COURT ROOM RULES OF EVIDENCE AND HOW THEY AFFECT LAW ENFORCEMENT

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The Federal Rules of Evidence (FREs) changed on 1 December 2000. These changes affect how law enforcement officers (LEOs) collect, preserve, and document evidence for court. The news this year is generally good for law enforcement. Some doors have been opened wider to us and some documents will be easier to collect and admit.

Cases grounded on quality and admissible evidence are the ones chosen for prosecution. Evidence that is not only admissible, but also has strong potential to convince juries, get convictions. By the time your investigation is underway and the prosecutor starts thinking about a trial, it may be too late to document facts necessary for admissibility. Physical evidence has been collected. Statements have been taken. Leads have dried up. Memories faded. Witnesses disappeared. Documents are shredded. E-mail has been deleted. And, of course, computer hard drives have crashed.

LEOs do not need to know the intricacies of the FREs any more than prosecutors need to know how to conduct a criminal investigation. But just as we want prosecutors to know some very basic law enforcement skills to better prosecute and win convictions, LEOs need to know what it takes to give prosecutors a winnable case supported by admissible evidence.

Only those rules that directly affect law enforcement are addressed. If you wish to see the actual changes to the FRE, email the author at khodges@fletc.treas.gov.

THE DOOR OPENS WIDER ON “BAD” CHARACTER EVIDENCE OF THE DEFENDANT

A. *THE WAY IT WAS*

During its case-in-chief, the prosecution may not offer character evidence (opinion or reputation) about the defendant to prove the defendant “acted in conformity” with that character trait. So, if the defendant is charged with a fraud crime, the prosecution cannot offer a witness to testify, “In my opinion the defendant is dishonest” or “The defendant has a reputation for being dishonest” to prove “he was a swindler before and he swindled again.” The *defense is permitted* to offer pertinent character traits of either the defendant or a victim. So, in our fraud case, the defendant could offer character evidence that the defendant was honest. Working on a theory that the victim was the real swindler, the defense could also offer evidence that the victim is dishonest. These rules have not changed.

Once the defense opens the door by offering character evidence, the prosecution can rebut with character evidence of the same trait pertaining to the same witness. For

example, defense character evidence that the defendant is honest can be rebutted by the prosecution with character evidence that he is dishonest. Defense character evidence that the victim is dishonest can be rebutted with prosecution evidence that the victim is honest. These rules have not changed.

The scope of the prosecution's rebuttal looked like this:

Defense offers: "The defendant is honest"

Prosecution rebuttal: "The defendant is dishonest."

Defense offers: "The victim is dishonest."

Prosecution rebuttal: "The victim is honest."

Except in limited assault prosecutions, the prosecution could *not* rebut defense evidence of the *victim's* bad character with evidence of the *defendant's* bad character, in effect saying, "The victim isn't the dishonest one, you, the defendant, are."

This limited scope of prosecution rebuttal usually worked to the defense's advantage. The defense could attack the victim's character without opening the door to the defendant's character. The prosecution could be armed with bad-character evidence about the defendant but could not use it unless the defendant offered evidence of his own character. The prosecution could not attack the defendant's character just because the victim's character was being assassinated.

B. *THE CHANGE*

If the defense attacks the *victim's character*, the prosecution may now offer evidence of the *defendant's character* in rebuttal.

The scope of the prosecution's rebuttal now looks like this:

Defense offers: The defendant is honest.

Prosecution rebuttal: The defendant is dishonest.

Defense offers: The victim is dishonest.

Prosecution rebuttal: The victim is honest *and/or* the defendant is dishonest.

LEOs should not confuse offering evidence of a defendant's or a victim's character trait with character evidence of truthfulness. The FREs have always provided that when a witness (to include the defendant) testifies, the other side may attack that witness' credibility by offering character evidence of untruthfulness. Also, if the truthfulness of a witness (to include the defendant) is attacked, the other side may rehabilitate the witness with character evidence of truthfulness.

C. *WHAT THIS MEANS TO LEOs*

Evidence of the defendant's "bad character" now has a greater chance of being admitted even if the defendant does not testify. LEOs now have a greater motive to collect and document it.

BUSINESS RECORDS: LAYING A FOUNDATION IS EASIER AND CUSTODIANS ARE LESS FREQUENTLY REQUIRED TO TESTIFY

A. *THE WAY IT WAS*

Unless the defense stipulated, admitting commercial business records into evidence usually required having the custodian testify to lay a foundation to meet authenticity requirements. While public (government) records were self-authenticating if under seal or certified, thereby eliminating the need to call witnesses to lay a foundation, there was no provision to allow commercial business records to be self-authenticating.

B. *THE CHANGE*

1. Self-authentication certification. If the custodian or "other qualified person" certifies that commercial business records meet certain criteria, the records will not require a witness to lay a foundation. The certification must state that the record (explanation in parenthesis):

(A) Was made at or near the time of the occurrence of the matters set forth by,
or from information transmitted by, a person with knowledge of those matters; (Was a record generated by either the person who completed the transaction or by a person who received information from the person who conducted the transaction?)

(B) Was kept in the course of the regularly conducted activity; (Did the business,
as part of its regular course of business, maintain such a record? An after-the-fact record that is not ordinarily created or not ordinarily maintained cannot be self-authenticating.)

(C) Was made by the regularly conducted activity as a regular practice.
(Did the business, as part of its regular course of business, create such a record? If a business activity does not ordinarily issue a written receipt, obtaining a receipt to be used in the trial does not meet self-authentication criteria.)

2. Types of records covered by the new rule. Records that businesses create and maintain in the ordinary course of business and which were created at or near the time of the transaction by people with knowledge of the transaction can be self-authenticating. If they are self-authenticating, a witness is not required to lay a foundation. For example, if a defendant

rented a car, a certified copy of the car rental contract is self-authenticating and, as we will see later, is admissible to prove that the defendant rented that car without the need to call a witness. Millions of business transactions that occur every day are accompanied by receipts,

confirmations, contracts, statements, and accountings. These transactions generate business records that can be self-authenticating.

3. Types of records that are not covered by the new rule. Unless the record meets all three criteria, it cannot be self-authenticating. So, for example, if a receipt is not regularly made and a copy maintained when conducting a transaction, having a sales person create a receipt after-the-fact will not result in a self-authenticating document. A specialized or tailored printout that is not ordinarily prepared at or near the time of a transaction cannot be self-authenticating.

4. The prior notice requirement. A party that wants to use self-authenticating business records must give advance notice before trial of the records being offered to give the opponent an opportunity to inspect and challenge them. This provision permits the trial lawyers to determine whether the document meets the business record criteria. The Rule will give the prosecution advance notice of defense self-authenticating business records, and it also gives the defense advance notice of prosecution records. Many of these records will be discoverable anyway under the Federal Rules of Criminal Procedure, but it is an issue that LEOs should discuss with prosecutors.

5. Hearsay and business records. Another significant issue with any piece of documentary evidence is whether the jury will be allowed to consider the contents of the document to prove the truth of what that documents says. Using the rental car contract example discussed earlier, self-authentication satisfies only authentication-foundation requirements. In other words, it satisfies the concern whether the record is an authentic record of the transaction. Because of the hearsay rule, authenticating the document does not mean that the document is admissible to prove the defendant rented a certain car. Under the old Rule, the prosecution would have to bring in a witness to testify to meet the business records hearsay exception. Under the new Rule, if the business record meets self-authentication standards, it also meets the business records hearsay exception and can be used to prove the truth of the matters contained in it.

C. *WHAT THIS MEANS TO LEOs*

1. Laying a foundation for most business records is now easier and will not ordinarily require calling a live witness at trial.

2. If a business record is self-authenticating, it also meets the requirements of the business records hearsay exception. No witness is required.

3. Advance notice must be given to the defense if self-authenticating business records will be offered at trial.

4. When collecting business records, establish the business record criteria with an employee of the company.

5. Work with your prosecutor to develop a template or standardized certificate to be used to self-authenticate business records. That document will probably have to be tailored to meet the facts of any particular record being collected.

THE SCOPE OF EXPERT AND LAY WITNESS TESTIMONY

A. *THE WAY IT WAS*

What is admissible as expert testimony has received enormous attention from the Federal Courts in the last seven years. Not only have juries come to expect physical evidence in criminal prosecutions, they expect experts to explain it. Defense counsel have also attempted to open expert witness doors to evidence of various disciplines that many claim are not scientifically based.

In most cases, a lay witness (non-expert) may not offer an opinion, but may only testify to facts about which they have personal knowledge. An expert witness is allowed to give an opinion. The battleground has been the topics on which experts may testify and how acceptable or reliable the body of science or expertise must be.

Lay witness opinion or inference is permitted only when rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. The permissible scope of lay witness testimony is often described as that which results from a reasoning process familiar to everyday life. A lay witness, for example, can testify, "He looked nervous as I approached." There were situations, however, where what should have been expert opinion was "smuggled" in as lay witness opinion without calling an expert witness. This would occur where someone without any specialized training or experience would be allowed to give their opinion in cases where an expert was required. For example, an opinion about a ballistics comparison with a photo showing the known and questioned projectiles might be based upon a rational perception, but it is really the subject of expert, not lay, testimony.

B. *THE CHANGE*

The Rules are now clear that an expert may give an opinion only if:

1. The testimony is based upon sufficient facts or data,
2. The testimony is the product of reliable principles and methods, and
3. The witness has applied the principles and methods reliably to the facts of the case.

More importantly for law enforcement, the scope of what a lay witness may testify about has been restricted to *exclude* that which is based on scientific, technical, or other specialized knowledge. Now, there is clear legal authority to exclude the testimony of those who are “almost experts.”

C. *WHAT THIS MEANS TO LAW ENFORCEMENT*

1. Opinions based on “scientific disciplines” that do not have a track record or are not shown to be reliable should be excluded from evidence. While challenging expert testimony is usually the prosecutor’s responsibility, LEOs who have information about the reliability or acceptance of a particular “expert” area, should let the prosecutor know.

2. Unless LEOs have knowledge, skill, experience, training or education to be an expert witness, they will not be permitted to give an opinion on scientific, technical, or other specialized knowledge.

CONCLUSION

The changes to the Federal Rules of Evidence are effective now in Federal trials. They do not apply to State court unless the State has adopted them. LEOs may wish to discuss these changes with their prosecutors for those cases in which the changes might apply.

CRIMINAL WITHOUT CONVICTION – PROSECUTING THE UNCONVICTED ARRIVING CRIMINAL ALIEN UNDER SECTION 212(a)(2)(A) OF THE IMMIGRATION AND NATIONALITY ACT

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The United States has long proscribed the admission of non-citizens who admit having committed crimes.¹ As set forth in the Immigration and Nationality Act (INA):

any alien ... who admits having committed, or who admits committing acts which constitute the essential elements of ... a crime involving moral turpitude ... or an attempt or conspiracy to commit such a crime ... or a violation of any law ... relating to a controlled substance ... is inadmissible.²

It is common knowledge that many individuals have committed serious crimes for which they have not been convicted. It is fortunate for law enforcement that an alien³ need only admit his criminal activity to be inadmissible to the United States.⁴ However, to be legally effective, these admissions must be handled in strict compliance with the law.

Initially, one might wonder why any individual would admit to uncharged criminal activity. Criminals in high crime areas routinely avoid police and seldom respond to any questioning. However, arriving aliens are often not as criminal savvy as the common street criminal. Additionally, unlike the common street criminal, the arriving alien must answer law enforcement questions to gain admission to the United States. Therefore, arriving aliens are much more likely to confess their criminal acts, especially when confronted with their prior criminal activity.

Immigration Inspectors and Border Patrol Agents are the officers who most commonly encounter the arriving alien. However, other law enforcement officers frequently encounter aliens who they suspect are involved in illegal activity. If information regarding this activity is routed to appropriate immigration authorities, such information can be documented and used as a basis of questioning if the alien departs the United States and attempts re-entry, or seeks to adjust his status within the United States.⁵ If the alien admits to such criminal activity, the alien can

¹ Once an alien is deemed inadmissible, he might still in fact avoid removal through various forms of relief. It is impossible to address all these facets of the ever-changing immigration law in an article of this length. This article is limited to a discussion of procuring admissions of criminal activity to successfully obtain a finding of inadmissibility under the INA.

² INA § 212(a)(2)(A)(i), 8 U.S.C § 1182(a)(2)(A)(i)(emphasis added)

³ An alien is "... any person not a citizen or national of the United States." INA § 101(a)(3), 8 U.S.C § 1101(a)(3)

⁴ Due to the incredible complexity of United States immigration law, some of these individuals might still be legally allowed to remain in the United States. However, a finding of inadmissibility under section 212(a)(2)(A)(i) has a significant impact on an alien's case and usually means that the alien will not be allowed to enter the United States or adjust their legal status within the United States. A law enforcement officer working with United States immigration laws should understand that section 212(a)(2)(A)(i) is a very useful tool, but it (like many other charges under the INA) does not guarantee removal of the alien from the United States.

⁵ Whether the alien has been legally admitted to the United States is a separate issue. The purpose of this article is

then be refused admission to the United States, even though he has not been convicted of the criminal offense.

This article gives an overview of the law in this area and provides practical advice to the law enforcement officer on how to obtain an admission of criminal activity sufficient to support a finding of inadmissibility under section 212(a)(2)(A)(i) of the INA.⁶

THE LAW

The INA provides that arriving aliens are inadmissible to the United States if they have been convicted of a crime involving moral turpitude,⁷ an attempt or conspiracy to commit such a crime,⁸ or a violation of a controlled substance offense of any State, the United States, or a foreign country.⁹ These aliens are also inadmissible if they merely admit having committed one of those offenses, even where there was no criminal prosecution.¹⁰ Finally, these aliens need only admit the essential elements of the criminal offense to be deemed inadmissible.¹¹ It is not necessary that they admit the legal conclusion that they in fact committed a specific crime.¹²

A plain reading of the statute suggests that factual admissions of criminal activity by the alien are sufficient to support a criminal charge of inadmissibility. However, these admissions must comply with seldom-cited¹³ but long-standing case law from the Board of Immigration Appeals¹⁴ (the Board) to effectively support a charge of inadmissibility.

In *Matter of K-*, the Board held that before an alien can be charged with inadmissibility due to admitting the elements of a crime involving moral turpitude, the alien must be given the following: 1) an adequate definition of the crime, including all essential elements, and 2) an explanation of the crime in understandable terms.¹⁵ The Board noted that these rules “were not

to demonstrate how an alien seeking admission to the United States or adjustment of his immigration status can be punished for criminal activity for which he has not been convicted.

⁶ 8 U.S.C. § 1182(a)(1)(A)(i). Trial attorneys of the Immigration and Naturalization Service (INS) may also wish to employ the tactics suggested in this article to obtain admissions of criminal activity in Immigration Court.

⁷ See INA § 212(a)(2)(A)(i)(I), 8 U.S.C § 1182(a)(2)(A)(i)(I)

⁸ *Id.*

⁹ See INA § 212(a)(2)(A)(i)(II), 8 U.S.C § 1182(a)(2)(A)(i)(II). There is an exception to this rule for crimes committed by minors and certain petty offenses. See INA § 212(a)(2)(A)(ii), 8 U.S.C. § 1182(a)(2)(A)(ii).

¹⁰ See INA § 212(a)(2)(A)(i), 8 U.S.C § 1182(a)(2)(A)(i)

¹¹ *Matter of E-V-*, 5 I&N Dec. 194 (BIA 1953)

¹² *Id.*

¹³ It is not exactly clear why there are not more recent precedent decisions on this issue. However, there are numerous different factors to consider. First, INS trial attorneys are actively discouraged from appealing adverse decisions. As a result, when the Immigration Court admits an alien charged with admitting criminal activity, it is very unlikely the INS will appeal, even if it believes the decision was wrong. Secondly, since aliens seeking admission to the United States are often detained throughout the hearing process, they frequently elect removal from the United States rather than remaining in detention throughout a lengthy appeal. Finally, it appears that many officers are simply not knowledgeable about this charge, and therefore do not use it aggressively. This article seeks to increase that knowledge, and thereby increase the application of this charge of inadmissibility.

¹⁴ The Board of Immigration Appeals is part of the Executive Office for Immigration Review, United States Department of Justice. It is an administrative panel charged with reviewing the decisions of Immigration Judges. Its precedent decisions are binding on these judges. See generally 8 C.F.R. 3.1.

¹⁵ 7 I&N 594, 597 (BIA 1957), citing *Matter of J-*, 2 I&N Dec. 285 (BIA 1945), modified by, *Matter of E-V-*, 5 I&N

based on any specific statutory requirement but appear to have been adopted for the purpose of insuring that the alien would receive fair play and to preclude any possible later claim by him that he had been unwittingly entrapped into admitting the commission of a crime involving moral turpitude.”¹⁶

Experience has demonstrated that very few law enforcement officers are aware of these rigid requirements. This is probably due to several reasons. First, the statute does not suggest the need to provide a specific definition and explanation of the criminal charge to the alien. Secondly, it hardly seems to violate the notion of “fair play” to ask an arriving alien if he has been involved in criminal activity. Finally, the issue of entrapment appears entirely misplaced because there is no government inducement.

Nonetheless, since *Matter of K-* and related cases have been precedent for over 40 years, it seems unlikely that the current Board will be inclined to overrule them. While not explicitly stated, it seems that the real concern of the Board is one of self-incrimination. Therefore, the prudent officer should build his case with that thought in mind. Additionally, the officer must remember that immigration laws do not usurp criminal self-incrimination law such as *Miranda v. Arizona*.¹⁷ Immigration proceedings are not criminal, and therefore an alien may be compelled to explain his criminal activity if he wants any immigration benefits, including admission to the United States. The alien’s answers or refusal to answer may result in his being denied admission to the United States. However, if a law enforcement officer wants to obtain information for use in a criminal prosecution, he must comply with criminal rules of obtaining evidence. In sum, section 212(a)(2)(A) is a valuable tool for removing aliens who admit to criminal activity for which they have not been convicted. It is not a means to compel an individual to criminally incriminate themselves in violation of the Fifth Amendment.

THE ADMISSIONS

As noted, the alien need only admit the elements of the crime, not the legal conclusion that he actually committed the crime.¹⁸ However, the admissions must be voluntary¹⁹ and unequivocal.²⁰ The admissions must, by themselves, constitute full and complete admission of (or attempt or conspiracy to commit) a crime involving moral turpitude or a controlled substance offense.²¹ If an alien has received a pardon for an offense, subsequent admission to the offense will not render him inadmissible.²² If the criminal offense was adjudicated and resulted in

Dec. 194 (BIA 1953)

¹⁶ *Id.*

¹⁷ 384 U.S. 436 (1966)

¹⁸ *Matter of K-*, *supra*, citing *Matter of E-V-*, 5 I&N Dec. 194 (BIA 1953); *see also generally Matter of G-M-*, 7 I&N Dec. 40 (BIA 1955), *affirmed* 7 I&N 40, 85 (A.G. 1956).

¹⁹ *Matter of G-*, 1 I&N Dec. 225, 227 (BIA 1942); *see generally Jelic v. INS*, 106 F.2d 14 (2d Cir. 1939)

²⁰ *Matter of L-* 2 I&N Dec. 486 (BIA 1946), *see also generally Matter of P-*, 4 I&N Dec. 252 (A.G. 1951)

²¹ *Matter of E-N-*, 7 I&N Dec. 153 (BIA 1956) (in dealing with a divisible statute, once the alien’s admissions reach the level of the misdemeanor offense, the court may not speculate that the alien would have been sentenced as a felon and therefore rendered inadmissible); *see generally Howes v. Tozer*, 3 F.2d 849 (1st Cir. 1925)

²² *Matter of E-V-*, 5 I&N Dec. 194 (1953)

dismissal, subsequent admissions by the alien will not establish inadmissibility unless the dismissal by the criminal court was on purely technical grounds.²³

BUILDING A CASE

It is the burden of an arriving alien to prove that he is admissible to the United States.²⁴ If an alien refuses to answer questions in support of his request to enter the United States, he can (and likely will) be deemed inadmissible. Therefore, it is unlikely that an alien will simply refuse to answer questions about criminal activity when questioned by a federal law enforcement officer.²⁵ An alien may lie about his prior criminal activity, but this (if discovered) will render the alien inadmissible on other grounds.²⁶

Many aliens do admit to criminal activity for which they have not been convicted. The alien may believe his actions were not criminal, or he may believe that without a conviction he cannot be further prosecuted. He likely suspects that the officer is aware of his criminal activity and that an admission, coupled with a fast-talking explanation, might allow him to convince the officer to permit him entry into the United States. In many instances the officer is alert to the possibility of criminal activity, based on arrest records or other leads.

As discussed previously, the mere admission of criminal activity is not enough to establish inadmissibility. The law enforcement officer must use lawful means to obtain admissions that will be legally sufficient to support the criminal charge of inadmissibility.

To meet that goal, the following process is recommended:

First, the alien should be thoroughly questioned to determine if he has committed a crime.²⁷ Where available, arrest records will provide the officer a starting point to initiate questioning.²⁸ Questioning should always be in a confident presumptive manner. For example, an officer encounters an alien with an arrest for cocaine possession but no conviction. He should not ask: “Have you ever knowingly possessed a controlled substance?” Rather, he should assert: “I see you’ve been involved with cocaine. Are you still dealing drugs?” When confronted with the very serious offense of trafficking in cocaine, many criminal drug users will immediately deny this offense while equivocating on the lesser offense of cocaine possession. Experience indicates that if this individual actually was involved with cocaine, they will likely admit to it if questioned properly. However, the officer must be very cognizant that the criminal alien might

²³ *Matter of C-Y-C-*, 3 I&N Dec. 623, 629-630 (BIA 1950)

²⁴ It should be noted that aliens who have entered without inspection are now inadmissible as if they were detained at the border. See INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i)

²⁵ As noted previously, such questioning may raise evidentiary and self-incrimination concerns under *Miranda* and similar cases. Discussion of this complex issue must wait for another day.

²⁶ Specifically, INA § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i)

²⁷ It is essential that this questioning be done in a language which the alien is fluent. An officer should always anticipate an allegation that the alien did not understand the questions. Any use of an interpreter should be carefully documented so that the interpreter can be called as a witness if necessary.

²⁸ As noted previously, if the true intent of the questioning is to build a case for criminal prosecution, the officer should be aware of potential Fifth Amendment self-incrimination issues. Removal hearings in Immigration Court are not criminal. Therefore, admissions of criminal activity that are admissible in Immigration Court may not be admissible in a criminal prosecution.

later assert he was improperly coerced into making damning admissions. Therefore, the officer should carefully document every circumstance surrounding the interrogation.²⁹

Once the “cat is out of the bag,” it is unlikely the alien will deny the criminal activity when the officer seeks to document the admissions in writing. However, before preparing the written statement, the officer must locate the precise state or federal criminal statute the alien admits violating. Within the context of a recorded³⁰ statement, the officer should present the elements of this statute to the alien, and have the alien admit to each element of the offense. For example, an officer learns that an arriving alien has an arrest record in the United States for sale of cocaine. This arrest did not lead to conviction. However, during questioning the alien admits that he had a personal problem with using cocaine but that he never sold it. Title 21 U.S.C. § 844 makes it unlawful to knowingly possess a controlled substance. Thereafter, the officer obtains admissions of criminal wrongdoing from the alien (in the alien’s language). Such an interrogation might go as follows:

Q. A few minutes ago you told me that you tried cocaine here in the United States. Did you in fact tell me that?

A. Yes

Q. In order to possess that cocaine you had to actually have it in your possession, correct?

A. Yes

Q. This wasn’t an accident, you knew you had cocaine in your possession, correct?

A. Yes

Q. Do you understand that Title 21 of the United States Code at section 844 makes it unlawful to knowingly possess a controlled substance?

A. Yes³¹

Q. Do you admit that on [date] you knowingly possessed cocaine?

²⁹ The author is confident of the ability to extract these admissions because he has done so many times in open court, an environment that can hardly be called a coercive atmosphere for extracting admissions of criminal activity.

³⁰ The statement may be recorded in writing or by electronic device. Audio / video recordings are an excellent means to record the demeanor of the parties and preserve exactly what was said during the interview. However, for evidentiary purposes, the statement should be properly reduced to writing to insure its admissibility in Immigration Court.

³¹ Having the alien confess to the actual criminal charge is actually beyond the strict requirements of existing case law. However, it is highly recommended that the officer obtain such confession where possible. This further negates any future claims by the alien that he did not realize he was admitting to criminal activity when he admitted the elements of the criminal offense.

A. Yes

Q. And this possession took place in the United States³²?

A. Yes

The alien may likely have a further explanation, such as the use was long ago, he's learned his lesson, etc. It is best to include every bit of this explanation in the written statement. This will help rebut any future claim from the alien that he was confused or that he did not mean he actually possessed cocaine.

CONCLUSION

Some aliens have been so frequently involved with the criminal justice system that they have no idea of the crimes for which they were actually convicted. Due to plea bargaining, these convictions may not truly reflect the extent of the alien's criminal activity. In these situations, admissions by the alien regarding his actual criminal behavior provide a far more truthful revelation about his criminal activity than a conviction record.

The skillful use of legitimate interrogation tactics can result in reliable admissions of criminal activity. However, to make an alien inadmissible to the United States these admissions must comply with existing law in both scope and form. Hopefully, the suggestions in this article will assist law enforcement officers to obtain admissions that are legally sufficient.

Some advocates complain that the tactics described in this article unfairly cause the criminal alien to admit to crimes. They suggest that unless the alien has been convicted by the criminal court system, it is unfair to punish him for criminal activity for which he has managed to avoid conviction. This attitude is simply not consistent with the law of the United States.

Admission to the United States is a privilege. The United States does not need to import criminals from overseas. Used properly, INA section 212(a)(2)(A)(i) provides one more weapon the law enforcement officer can use to protect the citizens of the United States.

³² Jurisdiction is a critical element in demonstrating that the alien's actions constituted a crime at the place where they occurred.

AN OVERVIEW OF “QUI TAM” ACTIONS

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BACKGROUND

Originally enacted in 1863, the False Claims Act¹ (FCA) was part of a concentrated effort by the Federal Government to combat defense contractor fraud during the Civil War.² Although the statute has undergone modifications throughout the years, its purpose remains the same: To prevent fraud against the United States. While there is little extraordinary about much of the FCA, the unusual enforcement mechanisms warrant examination. Within the FCA, two means of enforcement are outlined. Not surprisingly, the first vests primary authority for enforcement of the FCA in the hands of the Attorney General of the United States.³ However, the second mode of enforcement is somewhat more remarkable. These provisions, referred to as “qui tam” provisions, vest additional authority for enforcement of the FCA in the hands of private citizens, who are authorized to bring suit on behalf of the United States, with the promise of a share of any monies recovered serving as incentive.⁴ These suits, commonly known as “qui tam” actions, permit private individuals to sue on behalf of the United States to recover money that was fraudulently obtained by a person or corporation. The rationale behind sanctioning such suits was perhaps best expressed by the Supreme Court in *United States ex rel. Marcus v. Hess*: “... [O]ne of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain.”⁵

INITIATING A “QUI TAM” ACTION

To initiate the process, a private citizen, referred to as a “relator,” files the complaint in the United States District Court. The complaint must be filed in camera and remain under seal for at least 60 days, during which time all information contained within the complaint must be kept confidential from outside parties, including the defendant.⁶ The relator is also required by law to serve a copy of the complaint, as well as a written disclosure statement detailing all pertinent information in the relator’s possession, upon the United States Government.⁷ Once these steps have been taken, the United States is granted a mandatory 60-day period to

¹ 31 U.S.C.S. Sec. 3729 et. seq.

² Originally enacted in 1863 as the “Informer’s Act.”

³ 31 U.S.C.S. Sec. 3730(a)

⁴ Id. at Sec. 3730(b). The phrase “qui tam” is an abbreviation for “qui tam pro domino rege quam pro se ipso in hac parte sequitur,” which, when translated, means “Who brings the action for the King as well as for himself.” While “qui tam” actions originally developed in thirteenth-century England, the concept was first utilized in the United States by lawmakers of the First Congress, who included “qui tam” provisions in ten of the first fourteen American statutes imposing penalties. See Major John C. Kunich, USAF, “Qui Tam: White Knight or Trojan Horse,” 33 A.F.L. Rev. 31 (1990).

⁵ 317 U.S. 57, 541 n.5 (1943)

⁶ 31 U.S.C.S. Sec. 3730(b)(2)

⁷ Id.

investigate the relator's allegations and decide whether to intervene in the lawsuit and assume primary responsibility for the litigation.⁸ This 60-day period may be extended upon a showing of "good cause" and, as a practical matter, extensions are often liberally granted.⁹

GOVERNMENT ACTION

A. Government Intervenes

If the United States elects to intervene and assume primary responsibility for the litigation of the suit,¹⁰ the relator remains a party to the action. However, the United States may restrict the relator's role upon a showing of undue delay, repetition, etc..¹¹ For example, a relator may perform certain functions during the trial, such as calling and cross-examining witnesses, but the United States may limit the scope or length of that cross-examination to prevent undue delay. Further, if the United States intervenes, it may dismiss or settle the lawsuit over the relator's objection. Should the United States move to dismiss or settle the action, the relator must be notified of the intended action and provided an opportunity to be heard on the matter.¹² If the court determines the settlement to be "fair, adequate, and reasonable under all the circumstances," it will allow the settlement despite the objections of the relator.¹³ Where the United States elects to intervene in the action, the relator is nevertheless entitled to a share of any monies recovered from the defendant. Specifically, when the Government intervenes in a "qui tam" action, the relator is typically entitled to between 15% and 25% of the proceeds recovered in the action, as well as reasonable expenses and attorney's fees.¹⁴

B. Government Declines to Intervene

Following its investigation, the United States may decline to intervene in place of the relator.¹⁵ In such cases, the relator has the right to conduct the action and has primary responsibility for the litigation. Nonetheless, the United States maintains a significant amount of leverage to influence the lawsuit. For example, although not a party to the action, the United States may require both parties, upon request, to provide copies of all pleadings filed in the action, as well as copies of all deposition transcripts.¹⁶ Additionally, the court may, "without limiting the status and rights of the person initiating the action," allow the United States to intervene in a "qui tam" action after initially declining to do so, upon a showing of "good cause."¹⁷ Finally, some courts have permitted the United States to veto the proposed settlement

⁸ Id.

⁹ Id. at Sec. 3730(b)(3)

¹⁰ Id. at Sec. 3730(b)(4)(A)

¹¹ Id. at Sec. 3730(c)(2)(C)

¹² Id. at Sec. 3730(c)(2)(A) and (B)

¹³ Id. at Sec. 3730(c)(2)(B)

¹⁴ Id. at Sec. 3730(d)(1). Pursuant to Sec. 3730(d)(3), a relator will not be allowed to recover from the proceeds if he or she is convicted of criminal conduct arising from his or her role in the violation of the FCA. Further, if the relator is in some manner responsible for the violation, the court may reduce the share of the proceeds that the relator might otherwise receive, taking into consideration the role the relator played in bringing the case to court.

¹⁵ Id. at Sec. 3730(b)(4)(B)

¹⁶ Id. at Sec. 3730(c)(3)

¹⁷ Id.

of a “qui tam” action, even though it has previously declined to intervene in the case and makes no attempt to do so at a later date.¹⁸ Regardless, in those cases where the Government declines to intervene, the relator’s recovery amounts increase, as he or she bears the burden of financing the lawsuit. Specifically, when the relator pursues the action without United States intervention, the relator is entitled to receive an amount between 25% and 30% of the proceeds recovered in the action, as well as reasonable expenses and attorney’s fees.¹⁹

PUBLIC DISCLOSURE BAR

Prior to 1943, relators were permitted to initiate suits based upon information that was already in the possession of the Government. Thus, relators who had contributed little or no relevant information to the Government in their fight against fraud were reaping the benefits of the FCA.²⁰ In response to these “parasitic” lawsuits, Congress amended the FCA in 1943 to prohibit “qui tam” actions based upon information in the possession of the United States or any of its employees. This effectively prohibited any employee of the United States from initiating a “qui tam” action. The result of this broad jurisdictional bar was a drastic reduction in the number of “qui tam” actions brought during the years 1943 to 1986. However, the 1986 amendments to the FCA revitalized the “qui tam” provisions of the FCA and broadened the right to pursue “qui tam” actions as a means of combating fraud against the United States. These amendments eliminated the ban against “qui tam” actions based upon information in the possession of the United States or its employees and, instead, authorized private citizens (including employees of the United States) to bring “qui tam” actions, subject to only four (4) exceptions. One notable exception is the “public disclosure” bar. The “public disclosure” bar forbids a court from hearing a “qui tam” action if the litigation is based upon previously, publicly disclosed allegations or transactions, unless the relator is an “original source” of the information.²¹ Through this exception, “Congress was attempting to prevent parasitic lawsuits while, at the same time, not barring proper ‘qui tam’ claims by individuals who provided new information to the Government.”²²

The “public disclosure” of information can take place in one of three ways: First, during a criminal, civil, or administrative hearing; second, in a Congressional, Administrative, or General Accounting Officer report, hearing, audit, or investigation; or, third, in the news media.²³ If the qui tam” action is not based upon publicly disclosed information, the public disclosure” bar is inapplicable and the action may continue. However, if the court determines the qui tam” action is based upon publicly disclosed information, the relator must qualify as an “original source” of the

¹⁸ See *Searcy v. Phillips Electronics North America Corp.*, 117 F.3d 154 (5th Cir. 1997)(holding that United States has an absolute right to veto any proposed settlement, even if it previously declined to intervene). But see *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715 (9th Cir. 1994)(holding that United States may only veto a proposed settlement during the initial sixty days of the action, when it may still intervene as a matter of right).

¹⁹ 31 U.S.C. Sec. 3730(d)(2)

²⁰ See *Hess*, supra note 5, where the Supreme Court allowed a “qui tam” action in a case where the relators copied their complaint from a criminal indictment and had no original information of their own.

²¹ 31 U.S.C.S. Sec. 3730(e)(4)

²² See Christopher C. Frieden, “Protecting the Government’s Interests: Qui Tam Actions Under the False Claims Act and the Government’s Right to Veto Settlements of Those Actions,” 47 *Emory L.J.* 1041, 1048 (1998).

²³ 31 U.S.C.S. Sec. 3730(e)(4)(A)

information to avoid having the lawsuit dismissed. To qualify as an “original source,” the relator must have direct and independent knowledge of the allegations of fraud and voluntarily provide the information to the United States prior to filing a “qui tam” action.²⁴ By definition, a relator will not generally qualify as an “original source” if his or her information is obtained secondhand (e.g., from a friend or spouse).²⁵ Similarly, employees of the United States whose jobs require the investigation and uncovering of fraud (e.g., fraud investigators) will likely fail to qualify as an “original source” of the information, as they are not “voluntarily” providing the information to the United States, but are required to do so in the course of their duties.²⁶

PROVING A VIOLATION OF THE FCA

The FCA prohibits a variety of fraudulent acts.²⁷ However, in most actions brought pursuant to this statute, the relator must prove that the defendant “knowingly” presented to the United States a false or fraudulent “claim” for payment. Previous versions of the FCA required the relator to prove the defendant had “actual” knowledge of the false nature of the claim, as well as the specific intent to defraud the United States. However, the current version defines “knowing” and “knowingly” in a much more expansive manner and eliminates completely the requirement to demonstrate the defendant had the specific intent to defraud the United States. Now, a relator may succeed if it can be shown that the defendant (1) had “actual” knowledge of the false nature of the claim; (2) acted in “deliberate ignorance” of the truth or falsity of the claim; or (3) acted in “reckless disregard” of the truth or falsity of the claim.²⁸ Thus, a relator may ultimately succeed without ever having to prove the defendant had knowledge of the claim’s falsity. For example, a doctor who delegated billing authority to his wife and failed to review the claims for accuracy, was found guilty of a violation of the FCA based upon his “reckless disregard” for the truth or falsity of the billing records.²⁹

²⁴ Id. at Sec. 3730(e)(4)(B)

²⁵ See generally *United States ex rel. Devlin v. California*, 84 F.3d 358 (9th Cir.), cert. denied, 519 U.S. 949, 136 L.Ed.2d 252, 117 S. Ct. 361 (1996) (“... relator had ‘direct and independent’ knowledge because he had discovered the information ... through his own labor”).

²⁶ See generally *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir.), cert. denied, 499 U.S. 921, 113 L.Ed.2d 246, 111 S. Ct. 1312 (1990) (“It was LeBlanc’s responsibility, a condition of his employment, to uncover fraud. The fruits of his effort belong to his employer ? the government”).

²⁷ 31 U.S.C.S. Sec. 3729(a) imposes liability on any person who “(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; (4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate of receipt; (5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true; (6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.”

²⁸ Id. at Sec. 3729(b)

²⁹ See *United States v. Krizek*, 111 F.3d 934 (D.C. Cir. 1997).

A “claim” under the FCA is defined as:

“any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.”³⁰

The recognition of what constitutes a claim is critical for two reasons. First, the number of fraudulent claims presented by a defendant will determine the penalties that may be adjudged. Typically, a defendant is “liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus three times the amount of damages which the Government sustained because of the act of that person,” per claim.³¹ Second, and on a more practical level, increased penalties will result in an increased recovery for the relator, whose recovery is based upon the total proceeds recovered in the action.

PROTECTION AGAINST RETALIATION

While virtually anyone can be a relator, the majority of those who bring “qui tam” actions are current or former employees, who have an insider’s perspective on the wrongdoing. In order to protect vulnerable relators or employees, the FCA specifically forbids retaliation against those who initiate or assist in furthering a “qui tam” action.³² To aid in enforcing this prohibition, the statute confers a cause of action on the relator or employee in United States District Court.³³ In order to recover under the retaliatory provisions of the FCA, a relator or employee must prove that (1) his or her actions were taken in furtherance of the “qui tam” action; (2) the employer knew of the actions of the relator or employee; and (3) the relator or employee was retaliated against because of his or her actions in furtherance of the “qui tam” action.³⁴ If the relator or employee is successful, extensive relief may be granted, to include reinstatement with the same seniority status, two times the amount of back pay, interest on the back pay, etc..³⁵

³⁰ 31 U.S.C.S. Sec. 3729(c). Of note, pursuant to ? 3729(e), the FCA does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

³¹ Id. at Sec. 3729(a)

³² Sec. 3730(h) provides that “any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys’ fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in the subsection.”

³³ Id.

³⁴ See Frieden, *supra* note 22, at 1056.

³⁵ 31 U.S.C.S. Sec. 3730(h)

CONCLUSION

In this article, a general overview of selected issues has been provided to assist Federal law enforcement officers in gaining a basic understanding of “qui tam” actions. These actions provide the United States with a valuable tool in the fight against fraud. Further, through an understanding of these provisions, Federal law enforcement officers investigating fraud against the United States may likewise find the “qui tam” provisions to be a useful addition to their arsenal of weapons.

CHANGES TO THE MANUAL FOR COURTS-MARTIAL OF INTEREST TO LAW ENFORCEMENT OFFICERS

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On April 11, 2002, President Bush signed Executive Order 13262 amending the Manual for Courts-Martial (MCM). Those provisions of interest to law enforcement officers (LEOs) are summarized here. These changes are reflected in MCM 2002.

CHANGES TO THE NATURE OF OFFENSES AND AVAILABLE DEFENSES

Elimination of “suspect exception” to False Official Statement Offenses (Article 107). Prior to the change, it was a possible MCM defense to a charge of making a false official statement that the statement was made by a suspect during an interrogation unless the suspect had an independent duty or obligation to speak. This defense has been eliminated. EFFECT ON LAW ENFORCEMENT: The MCM 2000 suggested that the correct offense when a suspect lied to interrogators was false swearing if the statement was under oath. Now, when suspects lie to interrogators, charge false official statement. When the lie is made under oath, charge false swearing.

Larceny Using ATM Cards or Electronic Transactions (Article 121). When an accused was charged with wrongfully using an ATM, credit, debit, or similar card or code to obtain goods or money, there was a split of opinion whether this larceny was a “taking” or “obtaining.” The change makes clear that this offense is an “obtaining” by false pretenses. EFFECT ON LAW ENFORCEMENT: This clarification affects primarily trial counsel and military judges who prefer or instruct upon charges. LEOs, however, should always consult the MCM for the elements of an offense, and their definitions, during an investigation and before interrogations.

Adultery as Prejudicial to Good Order and Discipline or Service Discrediting (Article 134). Adultery, like most Article 134 offenses, requires the government to prove the act was to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces. Not every act of adultery can meet this test. MCM 2002 now provides general guidance and a list of factors to assist in deciding whether the adultery meets this element, including factors that focus on the facts and circumstances surrounding the relationship of the actors, the circumstances of the offense, and the effect the adultery had on the military. EFFECT ON LAW ENFORCEMENT: When LEOs are involved in investigating adultery cases, they should review the new MCM factors and collect evidence so commanders can make good decisions, and the trial counsel will be armed with sufficient evidence should the case be tried.

The significance of separations and mistake of fact in adultery offenses. The change provides that a marriage exists until it is dissolved in accordance with the laws of a competent state or foreign jurisdiction. It is no defense that the married participant is legally separated at the time of the offense, although it may be a factor in whether the conduct was prejudicial or service discrediting. In addition, MCM 2002 recognizes a defense of *mistake of fact* if the accused had an honest and reasonable belief either that the accused and the co-actor were both unmarried, or that they were lawfully married to each other. EFFECT ON LAW ENFORCEMENT: In adultery investigations, and

especially in interrogations of a suspect, LEOs should determine whether the accused may assert a mistake of fact claim, and then develop evidence that confirms or refutes the claim.

CHANGES IN COURTS-MARTIAL PROCEDURE

Gag orders. A military judge may now issue a protective order to prevent the counsel, the accused, and witnesses from making “extrajudicial statements that present a substantial likelihood of material prejudice to a fair trial by impartial members.” (R.C.M. 806(d)). EFFECT ON LAW ENFORCEMENT: LEOs must scrupulously obey a gag order. When there is a gag order and the investigation continues during the trial or while the trial is pending, LEOs should seek guidance from trial counsel on the effect of a gag order if the officer needs to discuss the offense with others.

Sequestration of witnesses from the courtroom. Before the change, M.R.E. 615 provided that, with some exceptions, a military judge “shall exclude” witnesses from a courts-martial if counsel for either side requests it. The old rule seemed to require sequestering crime victims who were to testify in the sentencing proceedings unless there was a statutory provision that permitted their presence. The change permits *some* victim-witnesses to be in the courtroom. EFFECT ON LAW ENFORCEMENT: LEOs with victim-witness responsibilities may have to reexamine their policies. Though the change might permit some victim-witnesses to remain in the courtroom, there may be instances where the trial counsel would still prefer to sequester the witness. Consult the trial counsel before telling a victim they may attend the proceedings.

Defense not required to disclose certain information that is privileged under the psychotherapist-patient privilege. Under the reciprocal discovery provisions, the defense can be required to disclose certain information. A change to R.C.M. 701 makes clear that disclosure would not include privileged matters protected under the psychotherapist-patient privilege in M.R.E. 513. (R.C.M. 701.) EFFECT ON LAW ENFORCEMENT: Law enforcement must remember that communications between a patient and their psychotherapists are privileged and cannot be obtained until a claim of privilege is resolved. Use great caution when investigating cases that lead to reviewing or seizing medical records.

Types of civilian convictions admissible during sentencing. Both military and civilian *convictions* are admissible during the sentencing phase of a trial. Civilian convictions include “any disposition following an initial determination or assumption of guilt, such as when guilt has been established by guilty plea, trial, or plea of *no lo contendre*, regardless of the subsequent disposition, sentencing procedure, or final judgment.” Deferred adjudications and the following are **not** convictions for sentencing purposes: “a diversion from the judicial process without a finding or admission of guilt; expunged convictions; juvenile adjudications; minor traffic violations; foreign convictions; tribal court convictions; or convictions reversed, vacated, invalidated or pardoned because of errors of law or because of subsequently discovered evidence exonerating the accused.” R.C.M. 1001(b)(3)(A). EFFECT ON LAW ENFORCEMENT: LEOs, not trial counsel, have the best sources to determine an accused’s criminal past. When NCIC or other sources of criminal information are not clear that there has been a finding of guilt (a conviction), LEOs should obtain the court records so the trial counsel may determine whether the matter is a *conviction*. In addition, LEOs should note that what is a conviction for purposes of impeachment (M.R.E. 609) is narrower than a conviction for sentencing purposes.

CHANGES TO MAXIMUM PUNISHMENTS

Maximum confinement and forfeitures in a Special Court-Martial increased to 1 year. Prior to the change, the maximum confinement and period of forfeitures at a special court-martial was only 6 months. (R.C.M. 201(f)(2)(B)). EFFECT ON LAW ENFORCEMENT: LEOs can expect that some cases that would have been tried at a general court-martial will now be tried at a special. A special court-martial does not require an Article 32 investigation.

Both fines and forfeitures may be adjudged at any court-martial. Prior to the change, summary and special courts-martial could adjudge fines or forfeitures, but not both. That limitation was removed. R.C.M. 1003(b)(3)

Confinement for life without eligibility for parole. The MCM change incorporates an earlier U.C.M.J. change providing that a sentence of life without eligibility for parole is permitted in cases where confinement for life is authorized. Confinement for life without eligibility for parole is also available in cases where the death penalty is authorized, except for convicted spies under Article 106 where the death penalty is mandatory. R.C.M. 1003(b)(7), R.C.M. 1004(e)

CHANGES TO SENTENCING THRESHOLDS

EFFECT ON LAW ENFORCEMENT: In light of these changes, agencies may wish to reconsider policies on investigative jurisdiction.

This is not a modified table of maximum punishments, but only an illustration of changes made to certain offenses. The maximum punishments have not changed, just the thresholds.

| Offense | Old Threshold | New Threshold | To impose a punishment of |
|---|----------------------|---|----------------------------------|
| Article 103, Offenses involving captured or abandoned property | \$100 or less | \$500 or less | BCD, 6 months |
| Article 103, Offenses involving captured or abandoned property | More than \$100 | More than \$500 or any firearm or explosive | DD, 5 years |
| Article 108, Military property offenses - Selling or disposing; willful damage, destruction, losing and willful suffering | \$100 or less | \$500 or less | BCD, 1 year |
| Article 108, Military property offenses - Selling or disposing; willful damage, destruction, losing and willful suffering | More than \$100 | More than \$500 | DD, 10 years |
| Article 108, Military property offenses - | \$100 or less | \$500 or less | 6 months |

| | | | |
|---|-----------------|-----------------|---------------|
| Neglect | | | |
| Article 108, Military property offenses - Neglect | More than \$100 | More than \$500 | BCD, 1 year |
| Article 109, Military property - Wasting etc. | \$100 or less | \$500 or less | BCD, 1 year |
| Article 109, Military property - Wasting etc. | More than \$100 | More than \$500 | DD, 5 years |
| Article 121, Larceny, Military property | \$100 or less | \$500 or less | BCD, 1 year |
| Article 121, Larceny, Military property | More than \$100 | More than \$500 | DD, 10 years |
| Article 121, Larceny, other than military property | \$100 or less | \$500 or less | BCD 6 months |
| Article 121, Larceny, other than military property | More than \$100 | More than \$500 | DD, 5 years |
| Article 121 Wrongful appropriation | \$100 or less | \$500 or less | 3 months |
| Article 121 Wrongful appropriation | More than \$100 | More than \$500 | BCD, 6 months |
| Article 123a, Check offenses, intent to defraud | \$100 or less | \$500 or less | BCD 6 months |
| Article 123a, Check offenses, intent to defraud | More than \$100 | More than \$500 | DD, 5 years |
| Article 126, Simple arson | \$100 or less | \$500 or less | DD, 1 year |
| Article 126, Simple arson | More than \$100 | More than \$500 | DD, 5 years |
| Article 132, False claims, false writings, papers, and oath | \$100 or less | \$500 or less | BCD, 6 months |
| Article 132, False claims, false writings, papers, and oath | More than \$100 | More than \$500 | DD, 5 years |
| Article 134, Obtaining services under false pretenses | \$100 or less | \$500 or less | BCD, 6 months |
| Article 134, Obtaining services under false pretenses | More than \$100 | More than \$500 | DD, 5 years |
| Article 134, Stolen property offenses | \$100 or less | \$500 or less | BCD, 6 months |
| Article 134, Stolen property offenses | More than \$100 | More than \$500 | DD, 3 years |